November 4, 1999

In the Matter of:		
Ronnie E. Simmons Claimant		
v.	Case Nos.	1994-LHC-1212, 1998-LHC-2975 and 1999-LHC-791/792/793/794
Electric Boat Corporation Employer/Self-Insurer		
and	OWCP Nos.	1-106643, 1-139584 and 1-139767/144632[1]/ 144631/134228
Director, Office of Workers' Compensation Programs, United States Department of Labor Party-in-Interest		

Appearances:

Carolyn P. Kelly, Esq.
For the Claimant

Peter D. Quay, Esq.
For the Employer/Self-Insurer

Merle D. Hyman, Esq.
Senior Trial Attorney
For the Director

Before: **DAVID W. DI NARDI**
Administrative Law Judge

[1]Apparently, OWCP Nos. 1-144632 and 1-134228 relate to Claimant's October 29, 1992 shipyard injury. (TR 11-12)

DECISION AND ORDER - AWARDING BENEFITS

This is a claim for worker's compensation benefits under the Longshore and Harbor Workers' Compensation Act, as amended (33 U.S.C. §901, **et seq.**), herein referred to as the "Act." The hearings were held on January 15, 1999 and on March 23, 1999 in New London, Connecticut at which time all parties were given the opportunity to present evidence and oral arguments. The following references will be used: TR for the official hearing transcript, ALJ EX for an exhibit offered by this Administrative Law Judge, CX for a Claimant's exhibit, DX for a Director's exhibit and RX for an Employer's exhibit. This decision is being rendered after having given full consideration to the entire record.

Post-hearing evidence has been admitted as:

Exhibit No.	**Item**	**Filing Date**
ALJ EX 12	Attorney Hyman's letter of March 17, 1999 advising that the Director, OWCP, will not be participating in this proceeding	03/24/99
RX 17	Notice relating to the taking of the deposition of John Swidrak	05/24/99
RX 18	Notice relating to the taking of the deposition of Charles Ballato	05/24/99
CX 21A	Attorney Kelly's letter filing the	05/28/99
CX 22	April 29, 1999 Deposition Testimony of Steven Selden, M.D.	05/28/99
CX 23	Attorney Kelly's letter clarifying the benefits being sought herein by the Claimant	06/04/99
RX 19	Attorney Quay's letter filing	06/15/99
RX 20	Claimant's March 29, 1999 Hospital Visit Report	06/15/99

RX 21	Employer's March 29, 1999 Restricted Duty Status Sheet for Claimant	06/15/99
RX 22	Attorney Quay's letter filing the following documents on behalf of the Employer	06/24/99
RX 23	May 26, 1999 Deposition Testimony of John Swidrak	06/24/99
RX 24	May 26, 1999 Deposition Testimony of Charles Ballato	06/24/99
RX 25	April 28, 1998 Payroll Adjustment (also labelled Deposition Exhibit 1)	06/24/99
RX 26	April 28, 1998 letter from Roger E. Bonin to the Connecticut Department of Labor	06/24/99
RX 27	June 21, 1999 memorandum from John F. Swidrak to Jack Shea	06/24/99
RX 28	June 14, 1999 letter from the Frick Company to the Employer with reference to Claimant's receipt of unemployment benefits	06/24/99
RX 29	June 18, 1999 memorandum from Hattie Johnson-Wimberly to J. Shea	06/24/99
CX 24	Attorney Kelly's letter commenting on RX 25 through RX 27	07/19/99
ALJ EX 13	This Court's **ORDER** relating thereto	07/21/99
CX 25	Attorney Kelly's letter filing the	07/27/99
CX 26	Claimant's July 22, 1999 Affidavit	07/27/99
CX 27	Attorney Kelly's letter requesting a two week extension of time for the parties to file their post-hearing briefs	07/29/99

CX 28	Attorney Kelly's letter jointly requesting an extension of time for the parties to file their briefs	09/13/99
CX 29	Attorney Kelly's letter filing	09/15/99
CX 30	Claimant's brief, as well as her	09/15/99
LX 31	Fee Petition	09/21/99
RX 30	Employer's brief	09/24/99
RX 31	Employer's comments on the fee petition	09/29/99
ALJ EX 14	This Court's **ORDER** directing the filing of additional data relating to Claimant's wages and and his shipyard employment	10/04/99
CX 32	Attorney Kelly's response filing	10/05/99
CX 33	Claimant's master personnel records, and the parties' stipulation as to Claimant's average weekly wage for his October 29, 1992 injury	10/05/99
CX 34	Attorney Kelly's response to the Employer's comments on her fee petition	10/07/99

The record was closed on October 7, 1999 as no further documents were filed.

Stipulations and Issues

The parties stipulate, and I find:

1. The Act applies to this proceeding.

2. Claimant and the Employer were in an employee-employer relationship at the relevant times.

3. On October 29, 1992, July 28, 1994, September 1, 1994, December 4, 1996 and January 13, 1997, Claimant suffered injuries in the course and scope of his maritime employment at the shipyard.

4. Claimant gave the Employer notice of the injuries in a timely manner.

5. Claimant filed a timely claim for compensation and the Employer filed a timely notice of controversion.

6. The parties attended the initial informal conference on August 12, 1998.

7. The applicable average weekly wage herein is $778.77 for the January 13, 1997 neck injury and $843.98 for his October 29, 1992 back injury. (CX 32)

8. The Employer voluntarily and without an award has paid certain benefits from January 16, 1997 through April 13, 1997, as well as additional benefits after Claimant's grievance proceeding resulted in a reinstatement order.

The unresolved issues in this proceeding are:

1. Whether Claimant's disability is due to his maritime employment.

2. If so, the nature and extent thereof.

3. Whether the Employer has shown the availability of suitable work either at the shipyard or elsewhere.[2]

4. Claimant's entitlement to medical benefits and interest on unpaid compensation.

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[2]As Claimant returned to work on March 29, 1999 at the shipyard, the Employer has now withdrawn as an exhibit its Labor Market Survey and Transferrable Skills Analysis. (RX 16, RX 19)

5. The applicability of Section 8(f).

6. Employer's credit for compensation benefits paid to the Claimant.

Summary of the Evidence

Ronnie E. Simmons ("Claimant" herein), with a high school education and an employment history of manual labor, began working on November 14, 1974 as a welder at the Groton, Connecticut shipyard of the Electric Boat Company, then a division of the General Dynamics Corporation ("Employer"), a maritime facility adjacent to the navigable waters of the Thames River where the Employer builds, repairs and overhauls submarines. As a welder Claimant built up expertise in the various forms of welding and he performed his assigned duties all over the boats and at the South Yard. He often had to perform his assigned duties in tight and confined areas, sometimes in awkward positions. He described his shipyard employment as physically-demanding work. (TR 36-38)

Claimant who served honorably in the U.S. Marine Corps has received treatment there for some of his various medical problems and Michael Buster, M.D., issued the following disability slip on August 8, 1978 (CX 1) (Emphasis added):

> **Mr. Simmons has a lumbosacral sprain (and) should avoid heavy lifting or performing tasks that stress the back.**

Claimant was then examined on August 22, 1978 by Edward D. Powers, M.D., and the doctor took history reports (1) that Claimant had reinjured his back on August 8, 1978 while he "was picking up lead from the ship that (he) was working on" and (2) that he had "originally hurt (his) back about six months (earlier), also at work." Dr. Powers, who read Claimant's lumbar spine x-ray as showing "a straightened lordosis" and "well preserved" disc spaces, gave his orthopedic impression as a "lumbosacral ligament sprain" and he prescribed pelvic traction, hot packs and massage, ultrasound, ORALID in deceasing dosage, Tylenol #3 and rest. (CX 2 at 1-4)

Dr. Powers continued to see Claimant as needed between January 16, 1979 and July 2, 1985. (CX 2 at 5-15) Claimant was also treated by Dr. John A. Calogero and Dr. David M. Geetter as needed, between August 16, 1979 and March 15, 1985, for his November of 1977 and August 8, 1978 back injuries. (CX 4) Claimant's October 19, 1982 lumbar myelogram showed abnormal changes on the left side at L4-5. (CX 5)

Dr. Philip Radding, an orthopedic surgeon, examined Claimant on January 19, 1983 at the Employer's request and the doctor opined "that the patient has a chronic lumbosacral strain and sprain for which he has received intensive physiotherapy" and the doctor "estimate(d) this present disability is approximately 10%." (CX 6)

Dr. John X. R. Basile, a neurosurgeon, also examined Claimant on December 1, 1983 at the Employer's request and the doctor, after the usual social and employment history, his review of diagnostic tests and the physical examination, gave his diagnosis as "chronic, recurrent lumbosacral strain and sprain." Dr. Basile agreed that Claimant should try to return to work but he "certainly cannot work in any stooped over, cramped tight spaces with his recurrent back problems." The doctor agreed that Claimant had a ten (10%) permanent partial disability "referrable to his lumbosacral spine," the doctor concluding: **He has had several injuries and naturally each injury aggravated the previous underlying original injury and made him worse. With having at least four injuries, such as he described, causing derangement to his lower back, certainly his back injury is much more than if he only had the more recent injury where he fractured his jaw**." (CX 7) (Emphasis added)

The March 27, 1985 Work Restriction Evaluation prepared by Dr. Powers for Claimant is in evidence as CX 8. The Employer accepted Claimant's return to work and provided suitable work within those restrictions. Claimant continued to work, although experiencing occasional flareups of back pain. He reinjured his back on January 25, 1988 while working in the welding shop and while "bending over to pick up (a) feeder." He immediately reported the injury at the Employer's Yard Hospital where a back sprain/strain was diagnosed. (RX 1) He was out of work for three days and the Employer authorized appropriate medical care and paid appropriate compensation benefits while he was unable to work because of that injury. (RX 3)

Claimant continued to work and experienced a flareup of back pain on June 24, 1988 and he went to see Dr. Powers who prescribed "a lumbosacral support," physical therapy and anti-inflammatory medication. According to Dr. Powers, Claimant "should be on light duty and do very little lifting at (that) time. He works on Submarines and he should do very little crouching and bending." (CX 9)

Dr. Powers saw Claimant as needed between July 16, 1988 and September 19, 1988, at which time the doctor released Claimant to return to work as a welder as "there is nothing further that (he could) do for" Claimant's "chronic back problem" which has resulted in a disability. (CX 9 at 2-6) The Employer paid compensation benefits from June 24, 1988 through September 20, 1988 and for his absence on January 10, 1989. (RX 3)

Dr. Powers next saw Claimant on March 5, 1990 for evaluation of "continued problems with his back." X-rays were again taken and they showed "a straightened lordotic curve with some mild narrowing at the L5/S1 interspace," as well as "a tilt to the right side." Dr. Powers "ordered a new support for him "and continued the medication and the exercise regimen, the doctor advising Claimant to return as needed. (CX 9 at 7) As of April 23, 1990, Dr. Powers reported that Claimant "is working in the shop and getting along fairly well with the (new back) support." (CX 9 at 8) Claimant experienced a flareup of back pain when "(h)e had to lift and hold some heavy objects." The doctor's impression was "an acute exacerbation ... with a limited range of motion with right sciatica" and the doctor prescribed medication, heat and massage at home. (CX 9 at 9)

Dr. Powers saw Claimant as needed between June 26, 1990 and February 25, 1991, at which time his restrictions were increased (CX 9 at 10-19), and between March 18, 1991 and April 6, 1992. (CX 9 at 20-34) I note Claimant's MRI showed a bulging disc at L4-5 centrally, as of July 30, 1990 (CX 9 at 11) and his x-rays, as of April 6, 1992, "continue(d) to show the narrowed disc space at L5/S1 with sclerosis of the articular margins." (CX 9 at 34)

Claimant injured his back, arms and right knee on October 29, 1992 while carrying a welding machine and climbing up a ladder. The accident happened while he worked off-site at Cocoa Beach, Cape Canaveral, Florida. He reported the injury on November 24, 1992 when he returned to the shipyard and the Employer again authorized treatment by Dr. Powers. (RX 11; CX 10)

Claimant saw Dr. Powers on April 19, 1993 for evaluation of back, right knee and bilateral arm problems resulting from his most recent injury. (CX 11) Dr. Powers reported that Claimant's bilateral shoulder x-rays were normal but the lumbar spine x-rays showed "a narrowing of the L5/S1 interspace with an osteoarthritic spur at the lower anterior aspect of L5." The right knee x-ray fail(ed) to show any evidence of fracture or dislocation." The doctor's diagnoses were "bilateral tendinitis of the shoulders, lumbosacral ligament sprain, medial collateral ligament sprain of the right knee" and he prescribed medication, physical therapy, medication and allowed him to continue working. (CX 11 at 1-2)

Dr. Powers continued to see Claimant as needed between May 5, 1993 an July 6, 1993. (CX 11 at 3-8)

Claimant injured his back, right shoulder and upper arm in a shipyard accident on July 28, 1994 (RX 13, CX 12) and he again went to see Dr. Powers and, according to the doctor's August 16, 1994 report (CX 11 at 9), "He has a chronic back problem. I do not feel there is anything further to do for him." The doctor prescribed Motrin, an exercise regimen, "a back support when he is doing anything heavy" and the doctor opined that Claimant could continue to do his light duty welding.

Dr. Powers next saw Claimant on September 27, 1994 for further evaluation of his back and shoulder problems. Claimant advised the doctor that he had continued to experience those problems since his last visit to the doctor "but he has not come into the office for fear of losing his job. He is working for Electric Boat and he said he was afraid if he missed time from work he would be fired." According to the doctor, Claimant was "in miserable shape" because of a "real acute exacerbation of this back problem and his shoulder problem." The doctor's diagnosis was "a real acute exacerbation of his tendonitis in the right shoulder" and "a real acute exacerbation of his low back problem." Dr. Powers prescribed Feldene and Tylenol with codeine and the doctor "allowed him to continue to work for fear he might lose his job" but he was "to wear his back support." Dr. Powers continued the exercises for Claimant's back, as well as "a course of iontophoresis to the right shoulder with exercises, ultrasound and moist heat." (CX 11 at 10-11)

Claimant's physical therapy records, totalling 72 pages, are in evidence as CX 19.

Claimant has alleged that his repetitive use of pneumatic and vibratory tools has resulted in numbness of both hands/wrists, a condition diagnosed as bilateral carpal tunnel syndrome as of December 4, 1996 and the Employer authorized treatment by Dr. Mara. (RX 14)

On January 13, 1997 Claimant was working on the 743 Boat and, as he stood up under the superstructure, he hit his head and jammed his neck. He reported the injury to his foreman and the Employer authorized treatment by Dr. Rodgers. (RX 4)

Dr. J. William Healy examined Claimant at Saint Francis Hospital and Medical Center on January 16, 1997 and the doctor concludes as follows in his report (CX 13):

"FINDINGS AND RECOMMENDATIONS:

This is a 45-year-old black male who struck his head on a metal bar while working on a submarine at the electric boat plant today. He was only momentarily unconscious but subsequently developed a headache and also blurred vision to the point where he had nausea and also bilateral blurring of vision which interfered with his driving. Nevertheless, he was able to make his way here to Hartford, although he had to stop off and on. He came to the Emergency Room of Saint Francis and a CAT scan was done which was negative. He denies any double vision, true vertigo or lateralized motor or sensory limb symptoms. No problem with speech (right-handed)...

On neurologic exam he was alert and cooperative but appeared somewhat confused. He was complaining bitterly of headache and it was difficult for him to get comfortable on the cot. He had tenderness over the posterior head region where he had struck his head, but there was no bruise palpable.

Visual fields were full on confrontation and the optic disks were well outlined. Pupils were reactive and extraocular movements were normal. There was no facial weakness and sensation of the face was normal...

IMPRESSION: History of cerebral concussion with subsequent blurring of vision.

DISPOSITION: Recommend observation with frequent neurologic signs overnight. However, I suspect the prognosis is good.

Dr. John W. Rodgers examined Claimant on January 27, 1997 and the doctor, in the progress report, states as follows (CX 15):

"Subjective: The patient continues to have headaches, particularly on the left side where he struck his head. He now has some occipital spasm on this side.

"Physical Examination: His mentation is normal. He is oriented times three. Cranial nerves are normal. His neurologic for motor and sensory is grossly normal as well.

"Impression: At this point he is status post concussion. Now he has some occipital and trapezius muscle spasm. I will try Xanax .25 mg. tid for possible early fibromyalgic symptoms. Reevaluate in three to four days."

Claimant's medical records reflect that he was examined at the Employer's request on March 10, 1997 by Dr. Daniel A. D'Angelo, an orthopedic surgeon, and the doctor, in his report, states as follows (RX 6):

"**HISTORY:** On January 13, 1997 he was working under the super structure doing some welding and he had to work in a tight space and as he was leaning he apparently lost his balance and as he went to straighten up he states he struck the back of his head in the occipital region and his neck against a scallop bar. He states he was not rendered unconscious but he was somewhat dazed and had to sit down for a while. He did report this injury almost immediately after to the plant hospital where he was seen. He states he finished his shift that evening and went home.

The next day he still had a considerable amount of pain in his neck and also a headache and he again went to the plant hospital after he returned to work and stayed there for almost two hours before his shift ended. He then was seen again on Wednesday, two days after the accident, still complaining of pain in his neck as well as headaches which were getting worse. He then was seen at the plant hospital and started on physical therapy where he apparently had ice packs/cold packs and application of ultrasound which made him worse, he states, and so this was stopped.

The next day he did not go to work because of a considerable amount of pain and then was seen at the emergency room of Saint Francis Hospital in Hartford. He at that time was complaining of neck pain and headaches and apparently he was examined and x-rays were obtained and he was then admitted overnight.

The next day he was then seen by Dr. Rodgers, the primary physician, at which time he was advised to be on physical therapy at St. Francis Hospital consisting of apparently ultrasound and massage and warm packs. He also was placed on Xanax which he has been taking every day.

He states about three or four days later he tried to return back to work but he states he was told by Dr. Rodgers he wasn't fit for work and therefore he has been receiving physical therapy at St. Francis Hospital three times a week to his cervical spine and his headaches he states has become somewhat less. His last physical therapy was approximately three days ago which was last Friday.

"**PRESENT COMPLAINTS:** He states his headaches are much less although he still had a headache last night and also this morning and this still usually occurs if he does his exercise which he has been doing at least twice a day which he was instructed to do at

physical therapy. The headaches are very minimal at this time compared to shortly after the injury.

As regard to the neck pain this also is apparently becoming much less and he is not aware of any pain while he is at rest. He does notice some discomfort it he rotates his head to the right or left or if he does extend his cervical spine.

He also has been taking Xanax twice a day and this usually helps him sleep at nighttime and also uses a special pillow at nighttime prescribed by physical therapy which does help him.

He has not been aware of any radiation pain down either upper extremity since this injury but he has been under the care of Dr. Mara, orthopedist, for carpal tunnel syndrome for the past three years. He has not been seen by any other specialist since this injury occurred.

"**PAST HISTORY:** He states he never had any difficulty with his cervical spine before this injury occurred on January 13, 1997.

He did have an injury to his left temperomandibular joint approximately 8 - 10 years ago while working at Electric Boat. He had three subsequent surgical procedures on the left temperomandibular joint on the left. He also had pneumonia once in the past and he is allergic to Penicillin, otherwise the only medication he is taking at the present time is Xanax twice a day...

"**IMPRESSION:** From the above, I have reviewed all the records submitted, and apparently he did strike his head against the scallop bar. I do believe that he did sustain a concussion from his history and possibly a contusion to his cervical spine. I do believe he sustained cervical strain as well as a result of this injury which occurred on January 13, 1997. I state that since he still has marked limitation of motion of his cervical spine with spasm in the left paracervical region.

I do not believe he had any pre-existing condition but he did have another injury to his cervical spine or head evidenced by the fact that he did have another CT scan dated 11-5-92 at St. Francis Hospital and he recalls another injury at that time.

By history his present complaints are related to the injury which occurred on January 13, 1997.

I do believe he should continue with his exercise program at least three to four times a day rather than only twice a day and also ice packs which he states affords him more relief than heat, at least

two or three times a day. He should continue with his medication and then be seen by his physician next week. If he is not improved he should have an x-ray of his cervical spine to rule out any specific bony injuries since he is markedly tender over the left paracervical region.

If he is somewhat better at that time and the x-rays are negative then I do believe that after a week to ten days or so he may return back to possibly part time work and not do any work as a welder since I do not believe he can do the work required as a welder at this time because of his continued limitation of motion of his cervical spine. Therefore I do not believe he has reached maximum medical improvement."

Dr. Rodgers states as follows in his March 26, 1997 letter (RX 7):

"To Whom It May Concern:

"RE: Ronnie Simmons

"Mr. Simmons is under my care. As is well documented, both in my chart as well as in the consult done by Dr. D'Angelo, Middlebury Orthopedic Group, P.C., done for Linda Nevith, National Employers, 2 Union Plaza, New London, Connecticut, Mr. Simmons struck the back of his head and neck while at work on January 13, 1997. It is well documented that he sustained an injury which resulted in persistent symptoms and that these symptoms caused him to be unstable on his feet, to feel like he might lose his balance and to have persistent posterior occipital and cervical pain.

"It is also clear from the record that this patient felt if he were to go back to work and had to be in any situation in which he had to balance or support his head in an awkward position that he might be unsafe in terms of operating machinery or doing his job. He was concerned about striking his head again in small spaces, and apparently his job requires that he be in tight enclosures and small spaces.

"I fail at this point to understand the confusion that Mrs. Nevith has apparently created with regard to my statement that the patient was reluctant to go to work. It is clear from the record that this patient was reluctant to go to work on the basis of safety issues with regard to his instability in terms of balance and pain in his posterior cervical area and occipital area.

"I would appreciate that the record as it is clearly printed, both in my chart and in the opinion of Dr. Daniel D'Angelo, be carefully reviewed again for the facts as they truly are rather than for the rumors that seem to promulgated with regard to this patient's medical condition. If you have any questions, please feel free to call me."

Dr. Rodgers next saw Claimant on April 11, 1997 and the doctor states as follows in his report (CX 15-6):

"Problem: Cervical sprain

"Subjective: The patient has persistent cervical tenderness and sprain, particularly in the left trapezius area. He has a little bit of stiffness to his neck. His balance, however, is better, and his gait is better.

"Physical Examination: Neurologic exam is entirely normal.

"Impression: At this point I feel that the patient can return to light duty, but I don't think that he can return to his employment as a welder crawling into small spaces and handling equipment which could potentially be dangerous until he no longer has a stiff neck and a sense of pain in his neck. I will reevaluate the patient in one month."

Dr. Rodgers states as follows in his April 11, 1997 disability slip (RX 8-4):

Patient "has mild but persistent cervical (neck) spasm. He can return to full light duty as of 4/14/97."

However, complications arose and the doctor states in his June 25, 1997 report (CX 15 at 8):

"As per our phone conversation, Mr. Ronnie Simmons was released back for work on 4/29/97. Subsequent to this he was readmitted to St. Francis Hospital on 5/10/97 for acute pulmonary embolism. He has now recovered from this as well and is on anticoagulation therapy."

Claimant was also examined at the Employer's request by Dr. Robert L. Fisher, an orthopedic surgeon, and the doctor states as follows in his May 29, 1997 report (ALJ EX 4):

"Ronnie Simmons is a 45-year-old man seen for an evaluation concerning an injury to his head.

"HISTORY OF PRESENT: This man worked for many years as a welder at

Electric Boat in Groton. He was injured on 1-13-97. He struck the back of his head and neck against a bar in the course of his job under a submarine. He was momentarily dazed and had to sit down for a while. He reported his injury but was able to finish his shift. The following day he had considerable head and neck pain. He went to the plant hospital and was seen again on the following day. He was apparently started on some physical therapy which seemed to make him worse. Because of severe pain he went to the St. Francis Hospital emergency room. He was examined and admitted over night.

He has subsequently been followed by Dr. Rogers (sic), his family doctor. He was treated with physical therapy consisting of ultrasound, massage and warm packs. He has been out of work since the injury. According to the patient there has been some confusion between him and his boss regarding his ability to return to work. He has been advised by Dr. Rogers to stay out of work. He actually had a CT scan at St. Francis Hospital which was within normal limits and showed no intra-cranial injury. According to the patient he is still having headaches. He has had some stiffness of his neck but has not really been aware of any definite neck pain. He has had no radiation of pain to his extremities. He did have a previous CT scan of his head in 1992 which he thinks may have been related to an automobile accident.

“EXAMINATION: The patient presents as a tall, thin man who appears somewhat older than his stated age. He is 6'1" and weighs 195 lbs. He walks with a normal gait and can walk on his heels and toes without difficulty. He has normal mobility of the lumbar spine. However, he has restricted mobility of the cervical spine in all planes with normal motion being reduced by about a third. There is some spasm throughout the cervical musculature though there is no real tenderness. Neurologic examination revealed symmetrical reflexes and no motor or sensory deficits in the upper extremities.

“IMPRESSION is that this patient had a direct blow to his head on 1-13-97 which resulted in a concussion and probable sprain of the cervical spine. Remarkably he has had no x-rays of his neck. While I do not suspect any fracture or subluxation, etc., I think these x-rays should probably be obtained in the course of his treatment. At this point I think he could return to his regular job. I do not feel he is going to have any permanent disability as a result of his injury. I would probably rate him for maximum medical improvement in about three or four months. From what I can understand the injury of 1-13-97 was definitely related to his employment at Electric Boat Corporation. I know of no antecedent injury or damage to his head or neck which would have made his present injury materially and substantially greater.”

Dr. Steven E. Selden, an orthopedic physician, examined Claimant on March 6, 1998 and the doctor is his report states as follows (RX 9 at 1-2):

CONSULTATION

CHIEF COMPLAINT

Low back pain.

HISTORY OF PRESENT ILLNESS

Mr. Ronnie Simmons is seen today for evaluation of low back pain. He is a patient of Dr. Powers but due to Dr. Powers' recent illness the patient is referred for evaluation. He has a long history of back problems. The patient has been under the care of Dr. Powers for a long time. A few records have been faxed and they go back to 1988. He had had low back pain at that time and had been treated with therapy. There is a note from 1990 which refers to a 1978 back injury diagnosis--a sprain. X-rays at that time showed narrowing of L5-S1. Another office note from 4/27/89 again refers to a back pain treated with medication, therapy program, and a support. A note from 1978 refers to an injury to his back when he was picking up lead from a ship. The patient had an injury 6 months earlier according to that report. Again a diagnosis of a sprain was made. The patient states he has had other injuries including one in 1993 in Florida when he fell from a ladder on a submarine.

The patient complains of pain in his lower back without significant radiation to his leg. He complains of pain and stiffness.

PAST MEDICAL HISTORY

The patient's general health is satisfactory. He is not working. He states he was laid off last year.

PHYSICAL EXAMINATION

On examination there is no swelling or deformity of his back. He has decreased mobility. His gait is satisfactory. He had no difficulty getting out of a chair. There is decreased mobility of the lumbar region and some discomfort with lumbar flexion. No gross neurologic deficits are found. Straight leg raising causes back pain but no leg pain.

X-RAY EXAMINATION

X-rays of the lumbar spine and pelvis were obtained. They show a significant narrowing at L5-S1.

IMPRESSION AND RECOMMENDATIONS

The patient has a chronic low back condition going back to several injuries which are work-related. I think there is little I have to offer him for this chronic problem. I did give him a prescription of Naprosyn to help him with his current discomfort and encouraged him to continue with a good exercise program to emphasize stretching and strengthening. Follow up will be on an as-needed basis.

Dr. Rodgers imposed work restrictions on Claimant on April 15, 1997 for thirty (30) days (RX 8 at 2-3) and the Employer was able to provide suitable alternate work within those restrictions. (RX 8 at 1)

As of March 31, 1998, Dr. Selden found Claimant's condition "improved," although he "still has some pain in his lower back but it is not as severe as it was previously." Claimant's "mobility has improved somewhat," the doctor found "no neurologic deficit" and he continued Claimant "on an appropriate exercise program" and on Naprosyn. The doctor released Claimant to return "on an as-needed basis." (RX 9-3)

Dr. Selden states as follows in his October 15, 1998 letter to Claimant's counsel (CX 18):

"I am responding to your letter of 8/14/98. Ronnie Simmons was last seen in this office in March 1998. He has had several low back injuries which have been work-related. I do not feel I have much else to offer him for his chronic low back problems.

"The patient is capable of working but should avoid repetitive bending, squatting, lifting and climbing. Occasional lifting to 25-30 lbs. would be appropriate."

Dr. Selden reiterated his opinions at his April 29, 1999 deposition and his opinions withstood intense cross-examination by Employer's counsel. (CX 22) Dr. Selden, who is Board-Certified as an Orthopedic Surgeon, testified that he first examined Claimant on March 6, 1998, that he has reviewed Claimant's medical records since 1978, that Claimant has had ongoing back problems since an August of 1978 injury at work, that he has experienced chronic back pain since that time as a result of numerous injuries thereafter, that there was not much that he could do for Claimant, other than

palliative treatment with medication as needed, and that he last saw Claimant on March 31, 1998. Claimant's work restrictions involve no repetitive bending, squatting, lifting, climbing and with occasional "lifting to 25 to 30 pounds." (CX 22 at 3-14)

Dr. Philo F. Willetts, Jr., an orthopedic surgeon, examined Claimant on December 4, 1998 at the doctor's request and the doctor, after the usual social and employment history, his review of Claimant's medical records and his review of diagnostic tests and the physical examination, issued the following (RX 10 at 11-14):

DIAGNOSIS:

1. Status post sprain right shoulder July 28, 1994, with no objective residual abnormalities.
2. Status post lumbar sprain October 29, 1992, by history, with residual complaints and symptoms of low back pain but no sign of surgically herniated disc or objective neurological deficit.
3. Complaints and symptoms of bilateral hand numbness, pain and discoloration, unsupported by physical examination, or previous cold immersion testing.
4. Status post cervical sprain January 13, 1997, with complaints and symptoms of residual neck pain, but no sign of surgically herniated cervical disc or upper extremity neurological deficit.
5. Status post complaints and symptoms of occasional knee pain, with no abnormalities on physical examination.
6. Status post episode of pulmonary embolus - unrelated.

DISCUSSION: I will try to respond to your questions in order as follows.

1. *Is he currently disabled due to this injury, and is it the sole cause of disability?*

I do not believe that Ronnie Simmons is disabled as a result of any of his injuries. Nor is any one the sole cause of any hypothetical disability. He states he was terminated from Electric Boat Corporation in March of 1997. He states he has been recalled, is awaiting his security clearance, and that if he gets it back, he intends to return to full duty. He does not appear to be disabled.

2. *If so, is he totally disabled or may he perform selected work?*

He does not appear to be disabled. He could do a wide variety of work.

3. *If capable of light work, what restrictions would you place on him?*

I do not believe, with the information available, that there is a need for any restrictions.

4. *Has he reached a point of maximum medical improvement?*

Yes.

5. *If so, when?*

I believe he reached maximum medical improvement for his low back injury stated to have been injured October 29, 1992, as of July 6, 1993, when he was last treated by Dr. Powers.

I believe he was at maximum improvement for any hand condition which he may have reported December 4, 1996, as of that date.

Although the General Dynamics Claim History stated there had been a date of injury of July 28, 1994, it is of interest to note Dr. Powers' medical note of August 17, 1994, which was seemingly unaware of such an injury, and stating there were no problems in the shoulders. Nor was there is a recorded complaint of shoulder pain at that time. Thus, any injuries sustained July 28, 1994, had reached maximum improvement as of August 15, 1994.

With respect to his January 13, 1997, injury he reached maximum medical improvement as of April 29, 1997, when he was released by Dr. Rodgers to work.

6. *If so, what percentage of permanent functional loss of use pursuant to the fourth edition of the AMA guidelines does he have due to this condition? Please apportion the impairment specific to the injury and the impairment attributable to the pre-existing conditions or factors.*

CERVICAL SPINE: Based upon Table 71 on page 109 of the AMA Guides, Mr. Simmons is most appropriately rated in DRE Impairment Category Roman I on page 110 of the AMA Guides. This is rated that complaints and symptoms and is rated at 0% impairment.

RIGHT SHOULDER: Based upon the findings, and the AMA Guides, there

is no impairment related to the right shoulder. His condition consists of complaints and symptoms.

LEFT SHOULDER: Similarly to above, based upon complaints and symptoms of the left shoulder, there is no impairment.

LUMBAR SPINE: Based upon some degree of disc protrusion noted on MRI, and using Table 71 on page 109 he is most appropriately rated in DRE Impairment Category Roman II in Table 72 on page 110 of the AMA Guides. That is rated at 5% permanent partial physical impairment of the whole person.

Using paragraph 3.3(k) on page 131 of the AMA Guides, 5% whole person impairment is equivalent to 7% permanent partial physical impairment of the lumbar spine.

> APPORTIONMENT: According to the above-referenced notes, there had been a history of back injury as far back as 1978, a work restriction evaluation of March 27, 1985, noting chronic low back symptoms at that time, and there was clear evidence of a preexisting back condition prior to October 29,1992. Thus of the 7% permanent partial physical impairment of the lumbar spine, 5% permanent partial physical impairment of the lumbar spine preexisted October 29, 1992, and if the above history be correct, 2% permanent partial physical impairment of the lumbar spine could fairly be apportioned to the October 29, 1992, injury.

RIGHT HAND: The complaints of numbness pain and cold intolerance of the right hand are unsupported on physical examination by positive objective findings. Two-point discrimination is normal. Phalen’s tests are negative. Allen’s tests are normal, and a cold immersion test, documented in the records above, failed to produce any finger blanching or support the claims of white finger after five minutes in cold water. Thus it appears that the right hand symptoms are complaints and symptoms, rather than being supported by clinical evidence of neuropathy. Thus there is 0% permanent partial physical impairment of the right hand.

LEFT HAND: Using similar reasoning, there is 0% permanent partial physical impairment of the left hand.

RIGHT KNEE: The right knee examination is normal with no evidence of abnormality. There is no impairment with respect to the right knee.

LEFT KNEE: Similarly, the left knee has some complaints and symptoms, a negative physical examination with no evidence, by AMA Guides criteria, of impairment.

7. *Are his injuries of 1/13/97, 12/4/96, 7/28/94, and 10/29/92, causally related to his employment at Electric Boat Corporation?*

If his history be correct the above injuries were causally related to his employment at Electric Boat Corporation. It is perplexing, however, to learn of an injury of July 28, 1994, when Dr Powers' own records approximately two weeks later, August 16, 1994, made no reference to being aware of any shoulder injury.

8. *Did he have any previous condition or injury which would combine with this injury to make his present injury materially and substantially greater?*

Yes. He had had a previous injury to his back referenced above as early as 1978, and he had evidence of ongoing chronic back complaints as of March 27, 1985. A lumbar spine MRI showed some disc protrusion as of June 19, 1990. Thus these previous conditions and injuries, when combined with the October 29, 1992, incident, did produce materially and substantially greater injury than what would have been produced by the October 29, 1992, injury alone.

Similarly, the above conditions, including the October 29, 1992, incident when combined with any incident that may have happened July 28, 1994, did produce materially and substantially greater injury than what would have occurred from any injury of July 28, 1994, alone.

Similarly, his previous conditions referenced above, combined with any incident of December 4, 1996, did produce materially and substantially greater injury than what would have been caused by any injury of December 4, 1996. Lastly, the above conditions, when combined with the injury reported of January 13, 1997, did produce materially and substantially greater injury than what would have been produced by the January 13, 1997, injury alone.

9. *Could you ask the claimant if he has worked in any capacity since his injury? What physical activity does he engage in?*

He said he continued to work until January 1997, at which time he was out of work. He denied working since then. He denied applying for any jobs since January, 1997.

Currently he said that he did almost no housework, walked one-

quarter of an hour per day, watched television one-half hour per day, read one hour per day, listened to music two hours per day, had a hobby of shooting pistols three to four hours per week at a gun club, and went shopping and ran errands one-half hour per week, according to the doctor.

Claimant testified that his supervisors knew of his chronic lumbar pains and protected him by giving easier work assignments over the years so that he could remain at the shipyard. Claimant's numerous injuries at the shipyard have been extensively summarized above to put these claims in proper perspective. Claimant denied that he was "reluctant" to work and he has given to on-duty personnel at the Employer's Yard Hospital the disability slips of Dr. Rodgers. Claimant presented one of those slips to Dave Richardson, the Employer's insurance adjuster, and, according to Claimant, Mr. Richardson believed that Claimant was able to return to work and "threatened" Claimant's job if he remained out on disability. Mr. Richardson told Claimant that he had to return to work on March 28, 1997 but Dr. Rodgers had opined that Claimant could neither climb nor work on the boats because of his post-concussion equilibrium problems. Claimant did not return to work and he was fired in mid-March of 1997. Claimant called the welding superintendent and he was told to bring in the doctor's disability slip. Claimant did so and he was sent to Charles Ballotto to see if light duty work was available until April 16th. (TR 42-53)

Claimant filed a grievance because of his termination and the arbitrator ruled that Claimant had been illegally terminated. The arbitrator ordered immediate reinstatement but, prior to being reinstated, Claimant was laid-off on March 28, 1998 and he was told that he would receive the same severance benefits as all other workers being laid-off at that time. Thereafter, Claimant was recalled to return to work on July 6, 1998 but he had to fill out a new employment application because his prior application had somehow been destroyed. Claimant had no idea as to why that application had been destroyed and why he was required to complete a new application, unlike the other workers being recalled to work. Claimant testified at the hearing that he was ready, willing and able to return to work but he is not allowed on shipyard property without a security clearance. There are three levels of security clearance at the shipyard, **i.e.**, a so-called "green badge," which is the minimal security clearance, and "red" and "blue badges," which are higher clearance levels and permit access to certain additional areas at the shipyard. Claimant called the Employer's personnel office shortly before his March 23, 1999 formal hearing and he was again told that the Department of Defense had not yet issued his security clearance. He has looked for work at the firms identified by the Employer in its labor market survey but those

jobs either were not available at the time he went there or they were not suitable for him. Claimant has no idea why his security clearance has been delayed but he suspects that it may be connected to the grievance claim that he filed and won. Claimant wants to return to work because he has worked his entire adult life and he simply does not want to remain at home. The Employer has not yet identified suitable alternate work, within his restrictions, at the shipyard. (TR 53-88) However, as indicated above, Claimant did return to work on March 29, 1999 at the shipyard. (RX 16, RX 19)

On the basis of the totality of this record and having observed the demeanor and heard the testimony of a credible Claimant, I make the following:

Findings of Fact and Conclusions of Law

This Administrative Law Judge, in arriving at a decision in this matter, is entitled to determine the credibility of the witnesses, to weigh the evidence and draw his own inferences from it, and he is not bound to accept the opinion or theory of any particular medical examiner. **Banks v. Chicago Grain Trimmers Association, Inc.**, 390 U.S. 459 (1968), **reh. denied**, 391 U.S. 929 (1969); **Todd Shipyards v. Donovan**, 300 F.2d 741 (5th Cir. 1962); **Scott v. Tug Mate, Incorporated**, 22 BRBS 164, 165, 167 (1989); **Hite v. Dresser Guiberson Pumping**, 22 BRBS 87, 91 (1989); **Anderson v. Todd Shipyard Corp.**, 22 BRBS 20, 22 (1989); **Hughes v. Bethlehem Steel Corp.**, 17 BRBS 153 (1985); **Seaman v. Jacksonville Shipyard, Inc.**, 14 BRBS 148.9 (1981); **Brandt v. Avondale Shipyards, Inc.**, 8 BRBS 698 (1978); **Sargent v. Matson Terminal, Inc.**, 8 BRBS 564 (1978).

The Act provides a presumption that a claim comes within its provisions. **See** 33 U.S.C. §920(a). This Section 20 presumption "applies as much to the nexus between an employee's malady and his employment activities as it does to any other aspect of a claim." **Swinton v. J. Frank Kelly, Inc.**, 554 F.2d 1075 (D.C. Cir. 1976), **cert. denied**, 429 U.S. 820 (1976). Claimant's uncontradicted credible testimony alone may constitute sufficient proof of physical injury. **Golden v. Eller & Co.**, 8 BRBS 846 (1978), **aff'd**, 620 F.2d 71 (5th Cir. 1980); **Hampton v. Bethlehem Steel Corp.**, 24 BRBS 141 (1990); **Anderson v. Todd Shipyards**, **supra**, at 21; **Miranda v. Excavation Construction, Inc.**, 13 BRBS 882 (1981).

However, this statutory presumption does not dispense with the requirement that a claim of injury must be made in the first instance, nor is it a substitute for the testimony necessary to establish a "**prima facie**" case. The Supreme Court has held that

"[a] **prima facie** 'claim for compensation,' to which the statutory presumption refers, must at least allege an injury that arose in the course of employment as well as out of employment." **United States Indus./Fed. Sheet Metal, Inc., v. Director, Office of Workers' Compensation Programs, U.S. Dep't of Labor**, 455 U.S. 608, 615 102 S. Ct. 1318, 14 BRBS 631, 633 (CRT) (1982), **rev'g Riley v. U.S. Indus./Fed. Sheet Metal, Inc.**, 627 F.2d 455 (D.C. Cir. 1980). Moreover, "the mere existence of a physical impairment is plainly insufficient to shift the burden of proof to the employer." **Id.** The presumption, though, is applicable once claimant establishes that he has sustained an injury, **i.e.**, harm to his body. **Preziosi v. Controlled Industries**, 22 BRBS 468, 470 (1989); **Brown v. Pacific Dry Dock Industries**, 22 BRBS 284, 285 (1989); **Trask v. Lockheed Shipbuilding and Construction Company**, 17 BRBS 56, 59 (1985); **Kelaita v. Triple A. Machine Shop**, 13 BRBS 326 (1981).

To establish a **prima facie** claim for compensation, a claimant need not affirmatively establish a connection between work and harm. Rather, a claimant has the burden of establishing only that (1) the claimant sustained physical harm or pain and (2) an accident occurred in the course of employment, or conditions existed at work, which could have caused the harm or pain. **Kier v. Bethlehem Steel Corp.**, 16 BRBS 128 (1984); **Kelaita**, **supra**. Once this **prima facie** case is established, a presumption is created under Section 20(a) that the employee's injury or death arose out of employment. To rebut the presumption, the party opposing entitlement must present substantial evidence proving the absence of or severing the connection between such harm and employment or working conditions. **Parsons Corp. of California v. Director, OWCP**, 619 F.2d 38 (9th Cir. 1980); **Butler v. District Parking Management Co.**, 363 F.2d 682 (D.C. Cir. 1966); **Ranks v. Bath Iron Works Corp.**, 22 BRBS 301, 305 (1989); **Kier**, **supra**. Once claimant establishes a physical harm and working conditions which could have caused or aggravated the harm or pain the burden shifts to the employer to establish that claimant's condition was not caused or aggravated by his employment. **Brown v. Pacific Dry Dock**, 22 BRBS 284 (1989); **Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986). If the presumption is rebutted, it no longer controls and the record as a whole must be evaluated to determine the issue of causation. **Del Vecchio v. Bowers**, 296 U.S. 280 (1935); **Volpe v. Northeast Marine Terminals**, 671 F.2d 697 (2d Cir. 1981); **Holmes v. Universal Maritime Serv. Corp.**, 29 BRBS 18 (1995). In such cases, I must weigh all of the evidence relevant to the causation issue. **Sprague v. Director, OWCP**, 688 F.2d 862 (1st Cir. 1982); **Holmes**, **supra**; **MacDonald v. Trailer Marine Transport Corp.**, 18 BRBS 259 (1986).

To establish a **prima facie** case for invocation of the Section 20(a) presumption, claimant must prove that (1) he suffered a harm, and (2) an accident occurred or working conditions existed which could have caused the harm. **See**, **e.g.**, **Noble Drilling Company v. Drake**, 795 F.2d 478, 19 BRBS 6 (CRT) (5th Cir. 1986); **James v. Pate Stevedoring Co.**, 22 BRBS 271 (1989). If claimant's employment aggravates a non-work-related, underlying disease so as to produce incapacitating symptoms, the resulting disability is compensable. **See Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986); **Gardner v. Bath Iron Works Corp.**, 11 BRBS 556 (1979), **aff'd sub nom. Gardner v. Director, OWCP**, 640 F.2d 1385, 13 BRBS 101 (1st Cir. 1981). If employer presents "specific and comprehensive" evidence sufficient to sever the connection between claimant's harm and his employment, the presumption no longer controls, and the issue of causation must be resolved on the whole body of proof. **See**, **e.g.**, **Leone v. Sealand Terminal Corp.**, 19 BRBS 100 (1986).

The Board has held that credible complaints of subjective symptoms and pain can be sufficient to establish the element of physical harm necessary for a **prima facie** case for Section 20(a) invocation. **See Sylvester v. Bethlehem Steel Corp.**, 14 BRBS 234, 236 (1981), **aff'd**, 681 F.2d 359, 14 BRBS 984 (5th Cir. 1982). Moreover, I may properly rely on Claimant's statements to establish that he experienced a work-related harm, and as it is undisputed that a work accident occurred which could have caused the harm, the Section 20(a) presumption is invoked in this case. **See**, **e.g.**, **Sinclair v. United Food and Commercial Workers**, 23 BRBS 148, 151 (1989). Moreover, Employer's general contention that the clear weight of the record evidence establishes rebuttal of the pre-presumption is not sufficient to rebut the presumption. **See generally Miffleton v. Briggs Ice Cream Co.**, 12 BRBS 445 (1980).

The presumption of causation can be rebutted only by "substantial evidence to the contrary" offered by the employer. 33 U.S.C. §920. What this requirement means is that the employer must offer evidence which completely **rules out the** connection between the alleged event and the alleged harm. In **Caudill v. Sea Tac Alaska Shipbuilding**, 25 BRBS 92 (1991), the carrier offered a medical expert who testified that an employment injury did not "play a significant role" in contributing to the back trouble at issue in this case. The Board held such evidence insufficient as a matter of law to rebut the presumption because the testimony did not completely rule out the role of the employment injury in contributing to the back injury. **See also Cairns v. Matson Terminals, Inc.**, 21 BRBS 299 (1988) (medical expert opinion which did entirely attribute the employee's condition to non-work-related factors was nonetheless insufficient to rebut the presumption where

the expert equivocated somewhat on causation elsewhere in his testimony). Where the employer/carrier can offer testimony which completely severs the causal link, the presumption is rebutted. **See Phillips v. Newport News Shipbuilding & Dry Dock Co.**, 22 BRBS 94 (1988) (medical testimony that claimant's pulmonary problems are consistent with cigarette smoking rather than asbestos exposure sufficient to rebut the presumption).

For the most part only medical testimony can rebut the Section 20(a) presumption. **But see Brown v. Pacific Dry Dock**, 22 BRBS 284 (1989) (holding that asbestosis causation was not established where the employer demonstrated that 99% of its asbestos was removed prior to the claimant's employment while the remaining 1% was in an area far removed from the claimant and removed shortly after his employment began). Factual issues come in to play only in the employee's establishment of the **prima facie** elements of harm/possible causation and in the later factual determination once the Section 20(a) presumption passes out of the case.

Once rebutted, the presumption itself passes completely out of the case and the issue of causation is determined by examining the record "as a whole." **Holmes v. Universal Maritime Services Corp.**, 29 BRBS 18 (1995). Prior to 1994, the "true doubt" rule governed the resolution of all evidentiary disputes under the Act; where the evidence was in equipoise, all factual determinations were resolved in favor of the injured employee. **Young & Co. v. Shea**, 397 F.2d 185, 188 (5th Cir. 1968), **cert. denied,** 395 U.S. 920, 89 S. Ct. 1771 (1969). The Supreme Court held in 1994 that the "true doubt" rule violated the Administrative Procedure Act, the general statute governing all administrative bodies. **Director, OWCP v. Greenwich Collieries**, 512 U.S. 267, 114 S. Ct. 2251, 28 BRBS 43 (CRT) (1994). Accordingly, after **Greenwich Collieries** the employee bears the burden of proving causation by a preponderance of the evidence after the presumption is rebutted.

As neither party disputes that the Section 20(a) presumption is invoked, **see Kelaita v. Triple A Machine Shop**, 13 BRBS 326 (1981), the burden shifts to employer to rebut the presumption with substantial evidence which establishes that claimant's employment did not cause, contribute to, or aggravate his condition. **See Peterson v. General Dynamics Corp.**, 25 BRBS 71 (1991), **aff'd sub nom. Insurance Company of North America v. U.S. Dept. of Labor**, 969 F.2d 1400, 26 BRBS 14 (CRT)(2d Cir. 1992), **cert. denied,** 507 U.S. 909, 113 S. Ct. 1264 (1993); **Obert v. John T. Clark and Son of Maryland**, 23 BRBS 157 (1990); **Sam v. Loffland Brothers Co.**, 19 BRBS 228 (1987). The unequivocal testimony of a physician that no relationship exists between an injury and a claimant's employment is sufficient to rebut the presumption. **See Kier v. Bethlehem**

Steel Corp., 16 BRBS 128 (1984). If an employer submits substantial countervailing evidence to sever the connection between the injury and the employment, the Section 20(a) presumption no longer controls and the issue of causation must be resolved on the whole body of proof. **Stevens v. Tacoma Boatbuilding Co.**, 23 BRBS 191 (1990). This Administrative Law Judge, in weighing and evaluation all of the record evidence, may place greater weight on the opinions of the employee's treating physician as opposed to the opinion of an examining or consulting physician. In this regard, **see Pietrunti v. Director, OWCP**, 119 F.3d 1035, 31 BRBS 84 (CRT)(2d Cir. 1997).

In the case **sub judice**, Claimant alleges that the harm to his bodily frame, **i.e.**, his chronic lumbar and cervical spine problems, resulted from working conditions at the Employer's shipyard. The Employer has introduced no evidence severing the connection between such harm and Claimant's maritime employment. Thus, Claimant has established a **prima facie** claim that such harm is a work-related injury, as shall now be discussed.

Injury

The term "injury" means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury. **See** 33 U.S.C. §902(2); **U.S. Industries/Federal Sheet Metal, Inc., et al., v. Director, Office of Workers Compensation Programs, U.S. Department of Labor**, 455 U.S. 608, 102 S.Ct. 1312 (1982), **rev'g Riley v. U.S. Industries/Federal Sheet Metal, Inc.**, 627 F.2d 455 (D.C. Cir. 1980). A work-related aggravation of a pre-existing condition is an injury pursuant to Section 2(2) of the Act. **Gardner v. Bath Iron Works Corporation**, 11 BRBS 556 (1979), **aff'd sub nom. Gardner v. Director, OWCP**, 640 F.2d 1385 (1st Cir. 1981); **Preziosi v. Controlled Industries**, 22 BRBS 468 (1989); **Januszewicz v. Sun Shipbuilding and Dry Dock Company**, 22 BRBS 376 (1989) (**Decision and Order on Remand**); **Johnson v. Ingalls Shipbuilding**, 22 BRBS 160 (1989); **Madrid v. Coast Marine Construction**, 22 BRBS 148 (1989). Moreover, the employment-related injury need not be the sole cause, or primary factor, in a disability for compensation purposes. Rather, if an employment-related injury contributes to, combines with or aggravates a pre-existing disease or underlying condition, the entire resultant disability is compensable. **Strachan Shipping v. Nash**, 782 F.2d 513 (5th Cir. 1986); **Independent Stevedore Co. v. O'Leary**, 357 F.2d 812 (9th Cir. 1966); **Kooley v. Marine Industries Northwest**, 22 BRBS 142 (1989); **Mijangos v. Avondale Shipyards, Inc.**, 19 BRBS 15 (1986); **Rajotte v. General**

Dynamics Corp., 18 BRBS 85 (1986). Also, when claimant sustains an injury at work which is followed by the occurrence of a subsequent injury or aggravation outside work, employer is liable for the entire disability if that subsequent injury is the natural and unavoidable consequence or result of the initial work injury. **Bludworth Shipyard, Inc. v. Lira**, 700 F.2d 1046 (5th Cir. 1983); **Mijangos**, **supra**; **Hicks v. Pacific Marine & Supply Co.**, 14 BRBS 549 (1981). The term injury includes the aggravation of a pre-existing non-work-related condition or the combination of work- and non-work-related conditions. **Lopez v. Southern Stevedores**, 23 BRBS 295 (1990); **Care v. WMATA**, 21 BRBS 248 (1988).

This closed record conclusively establishes, and I so find and conclude, that Claimant injured his head and neck in a concussion-type injury on January 13, 1997, that he also injured his back on October 29, 1992, that the Employer had timely notice of such injuries, authorized appropriate medical care and treatment (RX 4), timely controverted his entitlement to benefits (RX 5) and that Claimant timely filed for benefits once a dispute arose between the parties. In fact, the principal issue is the nature and extent of Claimant’s disability, an issue I shall now resolve.

Nature and Extent of Disability

It is axiomatic that disability under the Act is an economic concept based upon a medical foundation. **Quick v. Martin**, 397 F.2d 644 (D.C. Cir. 1968); **Owens v. Traynor**, 274 F. Supp. 770 (D.Md. 1967), **aff'd**, 396 F.2d 783 (4th Cir. 1968), **cert. denied**, 393 U.S. 962 (1968). Thus, the extent of disability cannot be measured by physical or medical condition alone. **Nardella v. Campbell Machine, Inc.**, 525 F.2d 46 (9th Cir. 1975). Consideration must be given to claimant's age, education, industrial history and the availability of work he can perform after the injury. **American Mutual Insurance Company of Boston v. Jones**, 426 F.2d 1263 (D.C. Cir. 1970). Even a relatively minor injury may lead to a finding of total disability if it prevents the employee from engaging in the only type of gainful employment for which he is qualified. (**Id.** at 1266)

Claimant has the burden of proving the nature and extent of his disability without the benefit of the Section 20 presumption. **Carroll v. Hanover Bridge Marina**, 17 BRBS 176 (1985); **Hunigman v. Sun Shipbuilding & Dry Dock Co.**, 8 BRBS 141 (1978). However, once Claimant has established that he is unable to return to his former employment because of a work-related injury or occupational disease, the burden shifts to the employer to demonstrate the availability of suitable alternate employment or realistic job opportunities which claimant is capable of performing and which he could secure if he diligently tried. **New Orleans (Gulfwide)**

Stevedores v. Turner, 661 F.2d 1031 (5th Cir. 1981); **Air America v. Director**, 597 F.2d 773 (1st Cir. 1979); **American Stevedores, Inc. v. Salzano**, 538 F.2d 933 (2d Cir. 1976); **Preziosi v. Controlled Industries**, 22 BRBS 468, 471 (1989); **Elliott v. C & P Telephone Co.**, 16 BRBS 89 (1984). While Claimant generally need not show that he has tried to obtain employment, **Shell v. Teledyne Movible Offshore, Inc.**, 14 BRBS 585 (1981), he bears the burden of demonstrating his willingness to work, **Trans-State Dredging v. Benefits Review Board**, 731 F.2d 199 (4th Cir. 1984), once suitable alternate employment is shown. **Wilson v. Dravo Corporation**, 22 BRBS 463, 466 (1989); **Royce v. Elrich Construction Company**, 17 BRBS 156 (1985).

On the basis of the totality of this closed record, I find and conclude that Claimant has established that he cannot now return to his full duties as a welder. The burden thus rests upon the Employer to demonstrate the existence of suitable alternate employment in the area. If the Employer does not carry this burden, Claimant is entitled to a finding of total disability. **American Stevedores, Inc. v. Salzano**, 538 F.2d 933 (2d Cir. 1976); **Southern v. Farmers Export Company**, 17 BRBS 64 (1985). In the case at bar, the Employer did submit evidence as to the availability of suitable alternate employment as of March 29, 1999 at its Shipyard. (RX 19) **See Pilkington v. Sun Shipbuilding and Dry Dock Company**, 9 BRBS 473 (1978), **aff'd on reconsideration after remand**, 14 BRBS 119 (1981). **See also Bumble Bee Seafoods v. Director, OWCP**, 629 F.2d 1327 (9th Cir. 1980). I therefore find Claimant had a total disability during those time periods he was out of work.

In his post-hearing brief at page 11 (CX 30), Claimant submits that he reached maximum medical recovery in May of 1980, at which time Dr. Powers rated Claimant’s lumbar spine impairment at ten (10%) percent. However, I cannot accept that date as Claimant reinjured his back on October 29, 1992 and required considerable treatment thereafter, as discussed further below.

Claimant's injury has become permanent. A permanent disability is one which has continued for a lengthy period and is of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. **General Dynamics Corporation v. Benefits Review Board**, 565 F.2d 208 (2d Cir. 1977); **Watson v. Gulf Stevedore Corp.**, 400 F.2d 649 (5th Cir. 1968), **cert. denied**, 394 U.S. 976 (1969); **Seidel v. General Dynamics Corp.**, 22 BRBS 403, 407 (1989); **Stevens v. Lockheed Shipbuilding Co.**, 22 BRBS 155, 157 (1989); **Trask v. Lockheed Shipbuilding and Construction Company**, 17 BRBS 56 (1985); **Mason v. Bender Welding & Machine Co.**, 16 BRBS 307, 309 (1984). The

traditional approach for determining whether an injury is permanent or temporary is to ascertain the date of "maximum medical improvement." The determination of when maximum medical improvement is reached so that claimant's disability may be said to be permanent is primarily a question of fact based on medical evidence. **Lozada v. Director, OWCP**, 903 F.2d 168, 23 BRBS 78 (CRT) (2d Cir. 1990); **Hite v. Dresser Guiberson Pumping**, 22 BRBS 87, 91 (1989); **Care v. Washington Metropolitan Area Transit Authority**, 21 BRBS 248 (1988); **Wayland v. Moore Dry Dock**, 21 BRBS 177 (1988); **Eckley v. Fibrex and Shipping Company**, 21 BRBS 120 (1988); **Williams v. General Dynamics Corp.**, 10 BRBS 915 (1979).

The Benefits Review Board has held that a determination that claimant's disability is temporary or permanent may not be based on a prognosis that claimant's condition may improve and become stationary at some future time. **Meecke v. I.S.O. Personnel Support Department**, 10 BRBS 670 (1979). The Board has also held that a disability need not be "eternal or everlasting" to be permanent and the possibility of a favorable change does not foreclose a finding of permanent disability. **Exxon Corporation v. White**, 617 F.2d 292 (5th Cir. 1980), **aff'g** 9 BRBS 138 (1978). Such future changes may be considered in a Section 22 modification proceeding when and if they occur. **Fleetwood v. Newport News Shipbuilding and Dry Dock Company**, 16 BRBS 282 (1984), **aff'd**, 776 F.2d 1225, 18 BRBS 12 (CRT) (4th Cir. 1985).

Permanent disability has been found where little hope exists of eventual recovery, **Air America, Inc. v. Director, OWCP**, 597 F.2d 773 (1st Cir. 1979), where claimant has already undergone a large number of treatments over a long period of time, **Meecke v. I.S.O. Personnel Support Department**, 10 BRBS 670 (1979), even though there is the possibility of favorable change from recommended surgery, and where work within claimant's work restrictions is not available, **Bell v. Volpe/Head Construction Co.**, 11 BRBS 377 (1979), and on the basis of claimant's credible complaints of pain alone. **Eller and Co. v. Golden**, 620 F.2d 71 (5th Cir. 1980). Furthermore, there is no requirement in the Act that medical testimony be introduced, **Ballard v. Newport News Shipbuilding & Dry Dock Co.**, 8 BRBS 676 (1978); **Ruiz v. Universal Maritime Service Corp.**, 8 BRBS 451 (1978), or that claimant be bedridden to be totally disabled, **Watson v. Gulf Stevedore Corp.**, 400 F.2d 649 (5th Cir. 1968). Moreover, the burden of proof in a temporary total case is the same as in a permanent total case. **Bell**, **supra**. **See also Walker v. AAF Exchange Service**, 5 BRBS 500 (1977); **Swan v. George Hyman Construction Corp.**, 3 BRBS 490 (1976). There is no requirement that claimant undergo vocational rehabilitation testing prior to a finding of permanent total disability, **Mendez v. Bernuth Marine**

Shipping, Inc., 11 BRBS 21 (1979); **Perry v. Stan Flowers Company**, 8 BRBS 533 (1978), and an award of permanent total disability may be modified based on a change of condition. **Watson v. Gulf Stevedore Corp.**, **supra**.

An employee is considered permanently disabled if he has any residual disability after reaching maximum medical improvement. **Lozada v. General Dynamics Corp.**, 903 F.2d 168, 23 BRBS 78 (CRT) (2d Cir. 1990); **Sinclair v. United Food & Commercial Workers**, 13 BRBS 148 (1989); **Trask v. Lockheed Shipbuilding & Construction Co.**, 17 BRBS 56 (1985). A condition is permanent if claimant is no longer undergoing treatment with a view towards improving his condition, **Leech v. Service Engineering Co.**, 15 BRBS 18 (1982), or if his condition has stabilized. **Lusby v. Washington Metropolitan Area Transit Authority**, 13 BRBS 446 (1981).

On the basis of the totality of the record, I find and conclude that Claimant reached maximum medical improvement on March 31, 1998 and that he was permanently and totally disabled from April 1, 1998, according to the well-reasoned opinion of Dr. Selden (RX 9-3), and such disability continued until March 29, 1999, at which time he returned to work.

In his post-hearing brief at page 11 (CX 30), Claimant submits that he reached maximum medical recovery in May of 1980, at which time Dr. Powers rated Claimant’s lumbar spine impairment at ten (10%) percent. However, I cannot accept that date as Claimant reinjured his back on October 29, 1992 and required considerable treatment thereafter, as discussed further below.

With reference to Claimant’s residual work capacity, an employer can establish suitable alternate employment by offering an injured employee a light duty job which is tailored to the employee's physical limitations, so long as the job is necessary and claimant is capable of performing such work. **Walker v. Sun Shipbuilding and Dry Dock Co.**, 19 BRBS 171 (1986); **Darden v. Newport News Shipbuilding and Dry Dock Co.**, 18 BRBS 224 (1986). Claimant must cooperate with the employer's re-employment efforts and if employer establishes the availability of suitable alternate job opportunities, the Administrative Law Judge must consider claimant's willingness to work. **Trans-State Dredging v. Benefits Review Board, U.S. Department of Labor and Tarner**, 731 F.2d 199 (4th Cir. 1984); **Roger's Terminal & Shipping Corp. v. Director, OWCP**, 784 F.2d 687 (5th Cir. 1986). An employee is not entitled to total disability benefits merely because he does not like or desire the alternate job. **Villasenor v. Marine Maintenance Industries, Inc.**, 17 BRBS 99, 102 (1985), **decision and order on**

reconsideration, 17 BRBS 160 (1985).

An award for permanent partial disability in a claim not covered by the schedule is based on the difference between claimant's pre-injury average weekly wage and his post-injury wage-earning capacity. 33 U.S.C. §908(c)(21)(h); **Richardson v. General Dynamics Corp.**, 23 BRBS (1990); **Cook v. Seattle Stevedoring Co.**, 21 BRBS 4, 6 (1988). If a claimant cannot return to his usual employment as a result of his injury but secures other employment, the wages which the new job would have paid at the time of claimant's injury are compared to the wages claimant was actually earning pre-injury to determine if claimant has suffered a loss of wage-earning capacity. **Cook**, **supra**. Subsections 8(c)(21) and 8(h) require that wages earned post-injury be adjusted to the wage levels which the job paid at time of injury. **See Walker v. Washington Metropolitan Area Transit Authority**, 793 F.2d 319, 18 BRBS 100 (CRT) (D.C. Cir. 1986); **Bethard v. Sun Shipbuilding & Dry Dock Co.**, 12 BRBS 691, 695 (1980). It is well-settled that the proper comparison for determining a loss of wage-earning capacity is between the wages claimant received in his usual employment pre-injury and the wages claimant's post-injury job paid **at the time of his injury**. **Richardson**, **supra**; **Cook**, **supra**.

The parties herein have the benefit of a most significant opinion rendered by the First Circuit Court of Appeals in affirming a matter over which this Administrative Law Judge presided. In **White v. Bath Iron Works Corp.**, 812 F.2d 33 (1st Cir. 1987), Senior Circuit Court Judge Bailey Aldrich framed the issue as follows: “the question is how much claimant should be reimbursed for this loss (of wage-earning capacity), it being common ground that it should be a fixed amount, not to vary from month to month to follow current discrepancies.” **White**, **supra** at 34.

Senior Circuit Judge Aldrich rejected outright the employer's argument that the Administrative Law Judge “must compare an employee's post-injury actual earnings to the average weekly wage of the employee's time of injury” as that thesis is not sanctioned by Section 8(h).

Thus, it is the law that the post-injury wages must first be adjusted for inflation and then compared to the employee's average weekly wage at the time of his injury. That is exactly what Section 8(h) provides in its literal language.

The law in this area is very clear and if an employee is offered a job at his pre-injury wages as part of his employer's rehabilitation program, this Administrative Law Judge can find that there is no lost wage-earning capacity and that the employee therefore is not disabled. **Swain v. Bath Iron Works Corporation**, 17 BRBS 145, 147 (1985); **Darcell v. FMC Corporation, Marine and Rail Equipment Division**, 14 BRBS 294, 197 (1981). However, I am also cognizant of case law which holds that the employer need not rehire the employee, **New Orleans (Gulfwide) Stevedores, Inc. v. Turner**, 661 F.2d 1031, 1043 (5th Cir. 1981), and that the employer is not required to act as an employment agency. **Royce v. Elrich Construction Co.**, 17 BRBS 157 (1985).

In the case at bar, the Employer offered at the hearing the January 26, 1999 Transferable Skills Analysis and Labor Market Survey of Ms. Susan C. Pierson-Bacon, MA/CAGS, CRC, CVE, CCM, QRC. (RX 16) However, by letter dated May 27, 1999, the Employer has withdrawn that report (RX 19), and that survey will not be considered herein.

While Claimant waited approximately eight (8) months to receive his security clearance from the Department of Defense to enable him to return to work at the Employer’s shipyard, he now has been cleared to return to work, and he did return on light duty restrictions on March 29, 1999. (RX 19)

Initially I note that I agree completely with Dr. Powers who opined, as of March 5, 1985, that Claimant “should have some vocational training” based on the fact that his physically-demanding jobs have resulted in occasional flareups of back pain and exacerbations of his weakened lumbar spine. (CX 2 at 14)

I also agree completely with Dr. Rodgers who stated as follows in his March 26, 1997 disability report (CX 15 at 5) (Emphasis added):

> **It is also clear from the record that this patient felt if he were to go back to work and had to be in any situation in which he had to balance or support his head in an awkward position that he might be unsafe in terms of operating machinery or doing his job. He was concerned about striking his head again in small spaces, and apparently his job requires that he be in tight**

enclosures and small spaces.

Moreover, according to Dr. Rodgers (**Id.**) (Emphasis added):

> **... It is well documented that he sustained an injury which resulted in persistent symptoms and that these symptoms caused him to be unstable on his feet, to feel like he might lose his balance and to have persistent posterior occipital and cervical pain.**

It is well-settled that the Employer must show the availability of actual, not theoretical, employment opportunities by identifying specific jobs available for Claimant in close proximity to the place of injury. **Royce v. Erich Construction Co.**, 17 BRBS 157 (1985). For the job opportunities to be realistic, the Employer must establish their precise nature and terms, **Reich v. Tracor Marine, Inc.**, 16 BRBS 272 (1984), and the pay scales for the alternate jobs. **Moore v. Newport News Shipbuilding & Dry Dock Co.**, 7 BRBS 1024 (1978). While this Administrative Law Judge may rely on the testimony of a vocational counsellor that specific job openings exist to establish the existence of suitable jobs, **Southern v. Farmers Export Co.**, 17 BRBS 64 (1985), employer's counsel must identify specific available jobs; generalized labor market surveys are not enough. **Kimmel v. Sun Shipbuilding & Dry Dock Co.**, 14 BRBS 412 (1981).

As already noted, the Employer has provided suitable alternate work at the shipyard, as of March 29, 1999, within the restrictions imposed by Dr. Selden. (CX 18-2)

The Employer, in an attempt to defend against this claim for total disability benefits from January 15, 1997 from through March 28, 1999, has offered the following evidence with reference to the Employer’s security procedures, the Employer essentially positing that the Employer was ready, willing and able to return Claimant to work at the shipyard but could not do so because his security file had been somehow destroyed and because his application for a new security clearance was delayed by his own actions and that of the Department of Defense.

The parties deposed John F. Swidrak on May 26, 1999 (RX 23) and Mr. Swidrak, who is Chief of Security for the Employer, oversees “the uniformed branch of security fire department and the clearance processing area,” Mr. Swidrak testifying that a security clearance is “a stipulation for employment here” for those “work(ing) with classified information,” that welders need a security clearance because they work “in that controlled industrial area (CIA) and they work on board submarines and in the

manufacturing area," that the "controlled industrial idea" is within "the second tier of (gates) where all the manufacturing of the submarine is completed" and that the docks are inside that "controlled industrial area." (RX 23 at 4-5)

At the time Claimant was laid-off, he had a so-called "green badge" which "was issued by the company many, many years ago and it was called company confidential. At the time the government was allowing us to issue company confidential badges ... after a review of a personnel security questionnaire. The green badge allows (the wearer) into the CIA area and access to only confidential information." However, after Claimant was successful in his grievance and after he had been ordered reinstated as a first class welder as of March 6, 1998 (RX 25), by that time the Department of Defense had "retracted their okay for us to issue those clearances" and now "we lost that ability to put our people right back to work when they applied for a job." Instead the DOD requires the Employer to submit the personal security questionnaire and application to the DOD and "the government was guaranteeing to us that they would turn around that processing time in three days. Well, that didn't happen." That "change in policy (by) the government" was applicable to all employees, not just Claimant. (RX 23 at 5-6)

As the DOD could not process the clearances within three (3) days, "the government has given us the ability to have a local government agency, our sup ships agency, review the clearance processing with a set of adjudication standards that they have and allow us to reissue a green badge." This is "called a Navy interim badge" and allows the wearer "into the CIA and allows you access to classified." However, "the clearance process continues through the government for the final DOD clearance which is required." All employees, whether a new or recalled employee, must go through those clearance procedures, Mr. Swidrak remarking, "we literally work on hundreds of clearances. This is a big place and a lot of clearances go through here. We're one of the major contributors to DISCO (Defense Investigative Security Clearance Office) as far as clearance requests." (RX 23 at 7-8)

The Navy Limited Interim Clearance Program was first initiated at Electric Boat in August of 1991 and, due to a Navy Directive, that program was terminated in August of 1998, but "was subsequently reinstated on February 16, 1999." (RX 27)

With reference to Claimant's reinstatement and his application for a security clearance, Mr. Swidrak testified that his "earliest connection with Mr. Simmons is on 9/21/98 when his electronic PSQ was submitted do DISCO for processing" in Columbus, Ohio, that DISCO replied on November 10, 1998 and "request(ed) from Mr.

Simmons some additional information, specifically a request for current employment."[3] The clearance was then resubmitted on November 18, 1998 and "again we received a letter from DISCO requesting the current employment on 12/22/98. And following that we sent a certified letter to Mr. Simmons which he picked up on January 20, 1999." Claimant finally received "an interim DOD secret clearance" on March 17, 1999 and Claimant's security clearance procedure was still ongoing as of the date of Mr. Swidrak's deposition. Claimant's interim clearance does permit him in the CIA, in the production areas and on the boats. (RX 23 at 9-11)[4]

In response to intense cross-examination, Mr. Swidrak was unable to give a clear answer as to why Claimant was not cleared through that local agency at the shipyard, especially as a document in evidence reflects that the interim clearance procedure was in effect at the shipyard from August of 1991 through August of 1998. (RX 27) Mr. Swidrak does not know when Claimant will receive his final security clearance. (RX 23 at 12-14)

The parties also deposed Charles Ballato on May 26, 1999 (RX 24) and Mr. Ballato, who has been a Human Resources Specialist for the Employer for ten (10) years, testified that he is "the management representative policing the labor agreement" between the company and the employees, that he "hears grievances with the union," that he "interpret(s) the contract for management representatives in the yard" and he "administer(s) discipline." According to Mr. Ballato, Claimant filed a grievance about his termination, that grievance was resolved by the March 6, 1998 award of Arbitrator Bornstein and on April 28, 1998 Mr. Ballato advised Roger Bonin in payroll that Claimant "was reinstated with full rights and benefits minus any interim pay." (RX 25)[5] Mr. Ballato then described the calculations which entered into that check sent to the Claimant in the amount of $13,585.95, after appropriate

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[3]This closed record does not reflect that document. I am curious as to why DISCO would need that information to process an application for a person who was improperly terminated, ordered reinstated, did not work in the interim and is seeking to return to work as directed.

[4]This case does manifest clearly why DOD was unable to process such clearances in three (3) days. Thus, the interim program was reinstated on February 16, 1999. (RX 27)

[5]That document does reflect that Claimant was on layoff status and his cheek would be picked up by John Adamson, "the chief steward of the boilermakers union." (RX 25 at 1)

deductions and credits. Claimant was reinstated as a first class welder effective March 6, 1998 and page 4 of RX 25 reflects that Claimant was on layoff status as of March 27, 1998 because "he was still not on board as an active employee." (RX 24 at 4-14)

In an attempt to rebut the post-hearing evidence offered by the Employer with reference to the security clearance procedures of the DOD, Claimant has offered his July 22, 1997 Affidavit wherein the affiant states (CX 26):

1. I am over the age of eighteen (18) years of age and believe in the obligation of the oath.

2. I was recalled by the Electric Boat Corporation on July 24, 1998.

3. I accepted the recall and went into the Office of Hattie Johnson-Wimberly on July 28, 1998.

4. I filled out my application and security form and returned them to Ms. Johnson-Wimberly.

5. When I returned for indoctrination on July 31, 1998, I told Ms. Johnson-Wimberly that I was having difficulty getting my fingerprints taken in Hartford because there were only certain days they did it and it cost $30.00.

6. She told me to go to the Groton Police Department, that they routinely did it for Electric Boat employees and there would be no charge.

7. I did go to the Groton Police Department where I had my fingerprints taken and returned the card on the same day or shortly after to the Electric Boat Company.

8. At some point after that, I was sent a letter requesting information about my father whom I had not been in contact with for many years until his death in January of 1998, and sisters and brothers, some of whom I had not seen in over ten years and had no address for.

9. My father had several families and the relationships among his offspring was not close.

10. I provided this information as best I could over a period of time by contacting other relatives.

As noted above, the crucial remaining issue herein is whether the Employer showed the availability of suitable alternate

employment by offering Claimant a job at its facility, even though Claimant was unable to begin work because his security clearance had not been approved. Although there is no case law directly on point, I find and conclude that the Employer has not established suitable alternate employment in the factual scenario presented herein.

An employer can establish suitable alternate employment by offering an injured employee a light duty job which is tailored to the employee's physical limitations, so long as the job is necessary and claimant is capable of performing such work. **Walker v. Sun Shipbuilding and Dry Dock Co.**, 19 BRBS 171 (1986); **Darden v. Newport News Shipbuilding and Dry Dock Co.**, 18 BRBS 224 (1986). Claimant must cooperate with the employer's re-employment efforts and if employer establishes the availability of suitable alternate job opportunities, the administrative law judge must consider claimant's willingness to work. **Trans-State Dredging v. Benefits Review Board, U.S. Department of Labor and Tarner**, 731 F.2d 199 (4th Cir. 1984); **Roger's Terminal & Shipping Corp. V. Director, OWCP**, 784 F.2d 687 (5th Cir. 1986). An employee is not entitled to total disability benefits merely because he does not like or desire the alternate job. **Villasenor v. Marine Maintenance Industries, Inc.**, 17 BRBS 99, 102 (1985), **Decision and Order on Reconsideration**, 17 BRBS 160 (1985).

The law in this area is very clear and if an employee is offered a job at his pre-injury wages as part of his employer's rehabilitation program, the administrative law judge can find that there is no lost wage-earning capacity and that the employee therefore is not disabled. **Swain v. Bath Iron Works Corporation**, 17 BRBS 145, 147 (1985); **Darcell v. FMC Corporation, Marine and Rail Equipment Division**, 14 BRBS 294, 197 (1981). However, I am also cognizant of case law which holds that the employer need not rehire the employee, **New Orleans (Gulfwide) Stevedores, Inc. v. Turner**, 661 F.2d 1031, 1043 (5th Cir. 1981), and that the employer is not required to act as an employment agency. **Royce v. Elrich Construction Co.**, 17 BRBS 157 (1985).

It is well-settled that the employer must show the availability of actual, not theoretical, employment opportunities by identifying specific jobs available for claimant in close proximity to the place of injury. **Royce v. Erich Construction Co.**, 17 BRBS 157 (1985). For the job opportunities to be realistic, the Respondents must establish their precise nature and terms, **Reich v. Tracor Marine, Inc.**, 16 BRBS 272 (1984), and the pay scales for the alternate jobs. **Moore v. Newport News Shipbuilding & Dry Dock Co.**, 7 BRBS 1024 (1978). While the administrative law judge may rely on

the testimony of a vocational counselor that specific job openings exist to establish the existence of suitable jobs, **Southern v. Farmers Export Co.**, 17 BRBS 64 (1985), employer's counsel must identify specific available jobs; generalized labor market surveys are not enough. **Kimmel v. Sun Shipbuilding & Dry Dock Co.**, 14 BRBS 412 (1981).

An employer can meet its burden by offering the claimant a job in its facility, **Spencer v. Baker Agricultural Co.**, 16 BRBS 205 (1984), including a light duty job, so long as it does not constitute sheltered employment. **Darden v. Newport News Shipbuilding & Dry Dock Co.**, 18 BRBS 224 (1986); **Harrod v. Newport News Shipbuilding & Dry Dock Co.**, 12 BRBS 10, 12-13 (1980). The judge need not examine job opportunities on the open market if the employer offers suitable work at its facility. **Conover v. Sun Shipbuilding & Dry Dock Co.**, 11 BRBS 676, 679 (1979).

The employer's job offer which is too physically demanding for the claimant to perform is not suitable alternate employment. **Bumble Bee Seafoods v. Director, OWCP**, 629 F.2d 1327, 1330, 12 BRBS 660, 662 (9th Cir. 1980); **Perini Corp. v. Heyde**, 306 F. Supp. 1321, 1328 (D.R.I. 1969); **Mason v. Bender Welding & Mach. Co.**, 16 BRBS 307, 309 (1984).

Neither is a job "available" when it is within the employer's exclusive control but the employer refuses to offer it to the claimant, **Berkstresser v. Washington Metropolitan Area Transit Authority**, 16 BRBS 231, 234 (1984), or when the employer refuses to alter working conditions in the manner required by all physicians of record to avoid recurrence of the disabling symptoms. **Crum v. General Adjustment Bureau**, 738 F.2d 474, 479-480, 16 BRBS 115, 123 (CRT)(D.C. Cir. 1984), **rev'g in pertinent part** 16 BRBS 101 (1983). **See poole v. National Steel & Shipbuilding Co.**, 11 BRBS 390 (1979)(job meeting only one restriction is not suitable alternate employment); **Jameson v. Marine Terminals**, 10 BRBS 194, 200 (1979)(offering to try employee in job not meeting medical restrictions is not suitable alternate employment).

A proffered job which is inaccessible to the claimant because he cannot physically handle a long commute is also unavailable. **Diamond M Drilling Co. v. Marshall**, 577 F.2d 1003, 1007-1009, 8 BRBS 658, 661-663 (5th Cir. 1978) **aff'g** 6 BRBS 114 (1977); **Sampson v. FMC Corp., Marine & Rail Equip. Div.**, 10 BRBS 929 (1979).

In **Marshall**, the employee suffered a massive heart attack while managing an offshore oil rig. 8 BRBS at 659. Seven days prior to the formal hearing, the employer offered the employee two

positions. (**Id.** at 661) The administrative law judge found that the employee was permanently and totally disabled after determining that he would be "unable to return to his oil field work (tool pusher or the somewhat similar jobs offered by the employer) because of his physical limitations." (**Id.** at 659) The Benefits Review Board affirmed, reasoning that the employee was physically unable to perform any of the jobs that the employer had available for the employee, and that the employer failed to prove that there actually were jobs available to the employee in his locality that he could perform. (**Id.**) The United States Court of Appeals for the Fifth Circuit affirmed, stating that,

> ...the medical evidence and respondent's post-injury rehabilitative and work experience provided a reasonable and substantial basis for the ALJ to conclude that respondent would encounter insurmountable physical problems in attempting to undertake either job offered by petitioner and thus to conclude that there was no evidence of actual job opportunities for the respondent, and therefore adjudge respondent to be totally disabled.

(**Id.** at 663)

The Fifth Circuit stated that "whether [employer's] job offers represent actual job opportunities to [employee] is, at best, highly speculative." 8 BRBS at 661. Although **Simmons** does not involve the question of whether the employee is physically able to perform the duties of the offered job, it does involve the question of whether the job offered by the Employer is an actual job opportunity to the Claimant. As Claimant's security clearance had not been approved during the pertinent time period, through no fault of his own, he was unable to work at the Employer's facility during the closed period involved herein.[6] Thus, the Employer has

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[6]A pre-injury criminal record is relevant in determining if jobs are realistically available to a Claimant. **Hairston v. Todd Shipyards Corp**., 849 F.2d 1194, 21 BRBS 122 (CRT) (9th Cir. 1988), **rev'g** 19 BRBS 6 (1986); **Piunti v. ITO Corp**., 23 BRBS 367 (1990). However, in the present matter, no evidence has been submitted which would establish that Claimant has a criminal record, or any other questionable personal history, which would result in his inability to obtain a security clearance. Moreover, the Board has even sanctioned an award of total disability benefits while the employee is incarcerated in a penal facility as the employer did not establish the availability of suitable alternate employment. **Allen v. Metropolitan Stevedore**, 8 BRBS 366 (1978). (A disabled employee does not lose his entitlement to compensation benefits if

not provided an actual job opportunity to the Claimant. Although the Department of Defense, not Employer, is responsible for the security clearance process, the pertinent fact is that it is not possible for the Claimant to begin performing the job offered by the Employer.[7]

Such a result flows logically from the goal of the Longshore Act. As the Fifth Circuit stated in **New Orleans (Gulfwide) Stevedores v. Turner**, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981), that goal is "not only of compensating for financial losses, but by unlimited obligations for continuing medical treatment, rehabilitating an injured worker so that he can become, to the extent possible, a productive member of society." If the job offered by the Employer in the present matter was found to constitute suitable alternate employment, Claimant would not be compensated for his financial losses. His benefits would be reduced from total to partial, without the opportunity for Claimant to make up the difference because he could not begin the employment offered to him. Claimant would not be a "productive member of society", as the lack of security clearance would prevent him from working. As the Employer is relying on the specific job it offered to Claimant to establish suitable alternate employment, and as Claimant cannot in fact engage in such employment through no fault of his own, suitable alternate employment cannot be established, in my judgment.

Even if the Employer's job offer is found to constitute suitable alternate employment, I would still conclude that Claimant is entitled to total disability benefits. In **Palombo v. Director, OWCP**, 937 F.2d 70, 25 BRBS 1 (CRT)(2d Cir. 1991), the United States Court of Appeals for the Second Circuit stated that "the claimant may rebut his employer's showing of suitable alternate employment-and thus retain entitlement to total disability benefits by demonstrating that he diligently tried but was unable to secure such employment." In the present matter, the Claimant did everything within his power to secure the job offered by the Employer. His failure was not due to his lack of diligence, but to the failure of the Department of Defense to approve his security clearance. Thus, as Claimant demonstrated that he diligently tried but was unable to secure the job offered by the Employer, he has

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during his convalescence and prior to his return to work he becomes incapacitated or is unable to return to work by a factor other than his disabling injury.)

[7]I am still not persuaded as to why Claimant's security file had been destroyed in the first place.

successfully rebutted the Employer's showing of suitable alternate employment.

While the Employer alleges that the delay herein was partly caused by the Claimant's failure to return the papers timely to the Employer, I do not find any such delay to be untimely or unreasonable, and I do so primarily because of Claimant's Affidavit wherein he details the steps he took to comply with the Employer's requests, all of which were made necessary because the Employer somehow destroyed Claimant's security file, a rather curious event and which has not been explained to my satisfaction. Moreover, while the Employer posits that the delay was due to Claimant's receipt of unemployment benefits, I reject such thesis as the Employer could have taken appropriate steps to protect its interests herein by bringing back to work an employee who, after a successful grievance proceeding, was ordered reinstated. Instead, Claimant was laid off, apparently because of the residual tension between Claimant and the Employer over the grievance proceeding and the successful conclusion thereof.

Accordingly, in view of the foregoing and as Claimant has now returned to work on March 29, 1999, on light duty restrictions, at his regular salary (RX 19) and as Claimant now seeks benefits only through March 28, 1999 (CX 23), I find and conclude that Claimant is entitled to an award of temporary total disability from March 17, 1997 through March 31, 1998 and permanent total disability from April 1, 1998 through March 28, 1999, at which time he returned to work. These benefits shall be based upon Claimant's average weekly wage of $843.98, as stipulated by the parties. (CX 32)

In his post-hearing brief, Claimant also seeks an award of temporary total disability benefits from January 15, 1997 through May 15, 1997 because of his inability to work because of his January 13, 1997 head and neck injury and because he was improperly terminated from employment. Claimant is entitled to such award as he was unable to work during that closed period of time. I agree with the arbitrator that Claimant was improperly terminated and Claimant's benefits for that closed period of time shall also be based upon his average weekly wage of $778.77,[8] Claimant is entitled to such benefits as such disability is related to those injuries, and he timely filed benefits.

[8]The Employer's brief is silent on this specific relief sought by Claimant for these two injuries before me, and no response to these specific claims was filed.

Medical Expenses

An Employer found liable for the payment of compensation is, pursuant to Section 7(a) of the Act, responsible for those medical expenses reasonably and necessarily incurred as a result of a work-related injury. **Perez v. Sea-Land Services, Inc.**, 8 BRBS 130 (1978). The test is whether or not the treatment is recognized as appropriate by the medical profession for the care and treatment of the injury. **Colburn v. General Dynamics Corp.**, 21 BRBS 219, 22 (1988); **Barbour v. Woodward & Lothrop, Inc.**, 16 BRBS 300 (1984). Entitlement to medical services is never time-barred where a disability is related to a compensable injury. **Addison v. Ryan-Walsh Stevedoring Company**, 22 BRBS 32, 36 (1989); **Mayfield v. Atlantic & Gulf Stevedores**, 16 BRBS 228 (1984); **Dean v. Marine Terminals Corp.**, 7 BRBS 234 (1977). Furthermore, an employee's right to select his own physician, pursuant to Section 7(b), is well settled. **Bulone v. Universal Terminal and Stevedore Corp.**, 8 BRBS 515 (1978). Claimant is also entitled to reimbursement for reasonable travel expenses in seeking medical care and treatment for his work-related injury. **Tough v. General Dynamics Corporation**, 22 BRBS 356 (1989); **Gilliam v. The Western Union Telegraph Co.**, 8 BRBS 278 (1978).

In **Shahady v. Atlas Tile & Marble**, 13 BRBS 1007 (1981), **rev'd on other grounds**, 682 F.2d 968 (D.C. Cir. 1982), **cert. denied**, 459 U.S. 1146, 103 S.Ct. 786 (1983), the Benefits Review Board held that a claimant's entitlement to an initial free choice of a physician under Section 7(b) does not negate the requirement under Section 7(d) that claimant obtain employer's authorization prior to obtaining medical services. **Banks v. Bath Iron Works Corp.**, 22 BRBS 301, 307, 308 (1989); **Jackson v. Ingalls Shipbuilding Division, Litton Systems, Inc.**, 15 BRBS 299 (1983); **Beynum v. Washington Metropolitan Area Transit Authority**, 14 BRBS 956 (1982). However, where a claimant has been refused treatment by the employer, he need only establish that the treatment he subsequently procures on his own initiative was necessary in order to be entitled to such treatment at the employer's expense. **Atlantic & Gulf Stevedores, Inc. v. Neuman**, 440 F.2d 908 (5th Cir. 1971); **Matthews v. Jeffboat, Inc.**, 18 BRBS at 189 (1986).

An employer's physician's determination that claimant is fully recovered is tantamount to a refusal to provide treatment. **Slattery Associates, Inc. v. Lloyd**, 725 F.2d 780 (D.C. Cir. 1984); **Walker v. AAF Exchange Service**, 5 BRBS 500 (1977). All necessary medical expenses subsequent to employer's refusal to authorize needed care, including surgical costs and the physician's fee, are recoverable. **Roger's Terminal and Shipping Corporation v.**

Director, OWCP, 784 F.2d 687 (5th Cir. 1986); **Anderson v. Todd Shipyards Corp.**, 22 BRBS 20 (1989); **Ballesteros v. Willamette Western Corp.**, 20 BRBS 184 (1988).

Section 7(d) requires that an attending physician file the appropriate report within ten days of the examination. Unless such failure is excused by the fact-finder for good cause shown in accordance with Section 7(d), claimant may not recover medical costs incurred. **Betz v. Arthur Snowden Company**, 14 BRBS 805 (1981). **See also** 20 C.F.R. §702.422. However, the employer must demonstrate actual prejudice by late delivery of the physician's report. **Roger's Terminal**, **supra**.

It is well-settled that the Act does not require that an injury be disabling for a claimant to be entitled to medical expenses; it only requires that the injury be work related. **Romeike v. Kaiser Shipyards**, 22 BRBS 57 (1989); **Winston v. Ingalls Shipbuilding**, 16 BRBS 168 (1984); **Jackson v. Ingalls Shipbuilding**, 15 BRBS 299 (1983).

On the basis of the totality of the record, I find and conclude that Claimant has shown good cause, pursuant to Section 7(d). Claimant advised the Employer of his work-related injury in a timely manner and requested appropriate medical care and treatment. However, the Employer did not accept the claim and did not authorize such medical care. Thus, any failure by Claimant to file timely the physician's report is excused for good cause as a futile act and in the interests of justice as the Employer refused to accept the claim. Thus, the Employer is responsible for Claimant’s reasonable and necessary medical expenses related to his January 13, 1997, subject to the provisions of Section 7 of the Act.

Interest

Although not specifically authorized in the Act, it has been accepted practice that interest at the rate of six (6) percent per annum is assessed on all past due compensation payments. **Avallone v. Todd Shipyards Corp.**, 10 BRBS 724 (1978). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to ensure that the employee receives the full amount of compensation due. **Watkins v. Newport News Shipbuilding & Dry Dock Co.**, 8 BRBS 556 (1978), **aff'd in pertinent part** and **rev'd on other grounds sub nom. Newport News v. Director, OWCP**, 594 F.2d 986 (4th Cir. 1979); **Santos v. General Dynamics Corp.**, 22 BRBS 226 (1989); **Adams v. Newport News Shipbuilding**, 22 BRBS 78 (1989); **Smith v. Ingalls Shipbuilding**, 22 BRBS 26, 50 (1989); **Caudill v.**

Sea Tac Alaska Shipbuilding, 22 BRBS 10 (1988); **Perry v. Carolina Shipping**, 20 BRBS 90 (1987); **Hoey v. General Dynamics Corp.**, 17 BRBS 229 (1985). The Board concluded that inflationary trends in our economy have rendered a fixed six percent rate no longer appropriate to further the purpose of making claimant whole, and held that ". . . the fixed six percent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. §1961 (1982). This rate is periodically changed to reflect the yield on United States Treasury Bills . . . ." **Grant v. Portland Stevedoring Company**, 16 BRBS 267, 270 (1984), **modified on reconsideration**, 17 BRBS 20 (1985). Section 2(m) of Pub. L. 97-258 provided that the above provision would become effective October 1, 1982. This Order incorporates by reference this statute and provides for its specific administrative application by the District Director. The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

Section 14(e)

Claimant is not entitled to an award of additional compensation, pursuant to the provisions of Section 14(e), as the Employer timely controverted Claimant's entitlement to benefits for his January 13, 1997 injury. (RX 5) **Ramos v. Universal Dredging Corporation**, 15 BRBS 140, 145 (1982); **Garner v. Olin Corp.**, 11 BRBS 502, 506 (1979).

Section 8(f) of the Act

Regarding the Section 8(f) issue, the essential elements of that provision are met, and employer's liability is limited to one hundred and four (104) weeks, if the record establishes that (1) the employee had a pre-existing permanent partial disability, (2) which was manifest to the employer prior to the subsequent compensable injury and (3) which combined with the subsequent injury to produce or increase the employee's permanent total or partial disability, a disability greater than that resulting from the first injury alone. **Lawson v. Suwanee Fruit and Steamship Co.**, 336 U.S. 198 (1949); **FMC Corporation v. Director, OWCP**, 886 F.2d 1185, 23 BRBS 1 (CRT) (9th Cir. 1989); **Director, OWCP v. Cargill, Inc.**, 709 F.2d 616 (9th Cir. 1983); **Director, OWCP v. Newport News & Shipbuilding & Dry Dock Co.**, 676 F.2d 110 (4th Cir. 1982); **Director, OWCP v. Sun Shipbuilding & Dry Dock Co.**, 600 F.2d 440 (3rd Cir. 1979); **C & P Telephone v. Director, OWCP**, 564 F.2d 503 (D.C. Cir. 1977); **Equitable Equipment Co. v. Hardy**, 558 F.2d 1192 (5th Cir. 1977); **Shaw v. Todd Pacific Shipyards**, 23 BRBS 96 (1989); **Dugan v. Todd Shipyards**, 22 BRBS 42 (1989); **McDuffie v. Eller and**

Co., 10 BRBS 685 (1979); **Reed v. Lockheed Shipbuilding & Construction Co.**, 8 BRBS 399 (1978); **Nobles v. Children's Hospital**, 8 BRBS 13 (1978). The provisions of Section 8(f) are to be liberally construed. **See Director v. Todd Shipyard Corporation**, 625 F.2d 317 (9th Cir. 1980). The benefit of Section 8(f) is not denied an employer simply because the new injury merely aggravates an existing disability rather than creating a separate disability unrelated to the existing disability. **Director, OWCP v. General Dynamics Corp.**, 705 F.2d 562, 15 BRBS 30 (CRT) (1st Cir. 1983); **Kooley v. Marine Industries Northwest**, 22 BRBS 142, 147 (1989); **Benoit v. General Dynamics Corp.**, 6 BRBS 762 (1977).

The employer need not have actual knowledge of the pre-existing condition. Instead, "the key to the issue is the availability to the employer of knowledge of the pre-existing condition, not necessarily the employer's actual knowledge of it." **Dillingham Corp. v. Massey**, 505 F.2d 1126, 1228 (9th Cir. 1974). Evidence of access to or the existence of medical records suffices to establish the employer was aware of the pre-existing condition. **Director v. Universal Terminal & Stevedoring Corp.**, 575 F.2d 452 (3d Cir. 1978); **Berkstresser v. Washington Metropolitan Area Transit Authority**, 22 BRBS 280 (1989), **rev'd and remanded on other grounds sub nom. Director v. Berstresser**, 921 F.2d 306 (D.C. Cir. 1990); **Reiche v. Tracor Marine, Inc.**, 16 BRBS 272, 276 (1984); **Harris v. Lambert's Point Docks, Inc.**, 15 BRBS 33 (1982), **aff'd**, 718 F.2d 644 (4th Cir. 1983); **Delinski v. Brandt Airflex Corp.**, 9 BRBS 206 (1978). Moreover, there must be information available which alerts the employer to the existence of a medical condition. **Eymard & Sons Shipyard v. Smith**, 862 F.2d 1220, 22 BRBS 11 (CRT) (5th Cir. 1989); **Armstrong v. General Dynamics Corp.**, 22 BRBS 276 (1989); **Berkstresser**, **supra**, at 283; **Villasenor v. Marine Maintenance Industries**, 17 BRBS 99, 103 (1985); **Hitt v. Newport News Shipbuilding and Dry Dock Co.**, 16 BRBS 353 (1984); **Musgrove v. William E. Campbell Company**, 14 BRBS 762 (1982). A disability will be found to be manifest if it is "objectively determinable" from medical records kept by a hospital or treating physician. **Falcone v. General Dynamics Corp.**, 16 BRBS 202, 203 (1984). Prior to the compensable second injury, there must be a medically cognizable physical ailment. **Dugan v. Todd Shipyards**, 22 BRBS 42 (1989); **Brogden v. Newport News Shipbuilding and Dry Dock Company**, 16 BRBS 259 (1984); **Falcone**, **supra**.

The pre-existing permanent partial disability need not be economically disabling. **Director, OWCP v. Campbell Industries**, 678 F.2d 836, 14 BRBS 974 (9th Cir. 1982), **cert. denied**, 459 U.S. 1104 (1983); **Equitable Equipment Company v. Hardy**, 558 F.2d 1192, 6 BRBS 666 (5th Cir. 1977); **Atlantic & Gulf Stevedores v. Director, OWCP**,

542 F.2d 602 (3d Cir. 1976).

Section 8(f) relief is not applicable where the permanent total disability is due **solely** to the second injury. In this regard, **see Director, OWCP (Bergeron) v. General Dynamics Corp.**, 982 F.2d 790, 26 BRBS 139 (CRT) (2d Cir. 1992); **Luccitelli v. General Dynamics Corp.**, 964 F.2d 1303, 26 BRBS 1 (CRT) (2d Cir. 1992); **CNA Insurance Company v. Legrow**, 935 F.2d 430, 24 BRBS 202 (CRT) (1st Cir. 1991). In addressing the contribution element of Section 8(f), the United States Court of Appeals for the Second Circuit, in whose jurisdiction the instant case arises, has specifically stated that the employer's burden of establishing that a claimant's subsequent injury alone would not have caused claimant's permanent total disability is not satisfied merely by showing that the pre-existing condition made the disability worse than it would have been with only the subsequent injury. **See Director, OWCP v. General Dynamics Corp. (Bergeron)**, **supra**.

On the basis of the totality of the record, I find and conclude that the Employer has satisfied these requirements. The record reflects (1) that Claimant has worked for the Employer since November 14, 1974, (2) that his employment history has been that of physically demanding, manual labor, (3) that Claimant has experienced lumbar problems since at least August 8, 1978 (CX 1), (4) that Claimant’s lumbar spine x-rays since August 22, 1978 have showed degenerative changes (CX 2), (5) that Claimant’s lumbar spine problems had resulted in a ten (10%) percent permanent partial impairment as of January 19, 1983 (CX 6), (6) that Claimant had sustained at least four (4) back injuries as of December 1, 1983 (CX 7), (7) that Claimant returned to work on March 27, 1985 with physical limitations and the Employer provided suitable adjusted work (CX 8), (8) that the Employer retained Claimant as a valued employee, (9) that Claimant reinjured his back on January 25, 1988 (RX 1) and again on June 24, 1988 (CX 9), (10) that Claimant continued to see Dr. Powers for treatment of his flareups of back pain (CX 9 at 2-6), (11) that Claimant’s lumbar problems worsened as a result of is work activities and such worsening is seen on his March 5, 1990 x-rays (“narrowing at the L5/S1 interspace”), on his July 30, 1990 MRI (“a bulging at L4/5 centrally”), (12) that Claimant injured his back, arms and right knee on October 29, 1992 at an off-site injury while working for the Employer at Cape Canaveral (RX 11), (13) that the Employer again retained Claimant as a valued employee, (14) that Claimant injured his back, right shoulder and upper arm on July 28, 1994 (RX 13), (15) that Claimant’s repetitive work activities between November 14, 1974 and December 3, 1996 have resulted in bilateral hand/arm problems, conditions diagnosed on December 4, 1996 by Dr. Mara (RX 14), (16) that he has sustained previous work-related

industrial accidents prior to January 13, 1997, (17) while working at the Employer's shipyard and (18) that Claimant's permanent total disability is the result of the combination of his pre-existing permanent partial disability and his January 13, 1997 injury as such pre-existing disability, in combination with the subsequent work injury, has contributed to a greater degree of permanent disability, according to Dr. Powers (CX 2 at 10-11, 15), Dr. Radding (CX 6), Dr. Basile (CX 7) and Dr. Willetts. (RX 10) **See Atlantic & Gulf Stevedores v. Director, OWCP**, 542 F.2d 602, 4 BRBS 79 (3d Cir. 1976); **Dugan v. Todd Shipyards**, 22 BRBS 42 (1989).

Claimant's condition, prior to his final accident on January 13, 1997, was the classic condition of a high-risk employee whom a cautious employer would neither have hired nor rehired nor retained in employment due to the increased likelihood that such an employee would sustain another occupational injury. **C & P Telephone Company v. Director, OWCP**, 564 F.2d 503, 6 BRBS 399 (D.C. Cir. 1977), **rev'g in part**, 4 BRBS 23 (1976); **Preziosi v. Controlled Industries**, 22 BRBS 468 (1989); **Hallford v. Ingalls Shipbuilding**, 15 BRBS 112 (1982).

Even in cases where Section 8(f) is applicable, the Special Fund is not liable for medical benefits. **Barclift v. Newport News Shipbuilding & Dry Dock Co.**, 15 BRBS 418 (1983), **rev'd on other grounds sub nom. Director, OWCP v. Newport News Shipbuilding & Dry Dock Co.**, 737 F.2d 1295 (4th Cir. 1984); **Scott v. Rowe Machine Works**, 9 BRBS 198 (1978); **Spencer v. Bethlehem Steel Corp.**, 7 BRBS 675 (1978).

However, Section 8(f) relief is moot herein at the present time as the Employer’s obligation for permanent benefits does not exceed 104 weeks and I have made these findings for the future guidance of the parties.

Attorney's Fee

Claimant's attorney, having successfully prosecuted this matter, is entitled to a fee assessed against the Employer as a self-employer Claimant's attorney filed a fee application on September 2, 1999 (CX 31), concerning services rendered and costs incurred in representing Claimant between August 13, 1998 and September 9, 1999. Attorney Carolyn P. Kelly seeks a fee of $11,906.86 (including expenses) based on 53 hours of attorney time at $185.00 per hour and 10.50 hours of paralegal time at $55.00 per hour.

The Employer has objected to the requested attorney's fee as excessive in view of certain itemized services totalling 2 hours

and litigation expenses of $13.85. (RX 31)

Attorney Kelly filed a reply to the Employer's objections and counsel agrees that the Employer's objections are well-taken. Accordingly, the duplicate services itemized on August 14, 1998, June 2, 1999 and July 15, 1999 are hereby deleted and the fee petition is reduced by 1.25 hours of attorney services. However, the postage charge is approved as an extraordinary expense required by this case and not included within the firm's usual overhead. In this regard, **see Picinick v. Lockheed Shipbuilding**, 23 BRBS 128 (1989). Therefore, all of the items of the fee petition, except as discussed above, are hereby approved.

In accordance with established practice, I will consider only those services rendered and costs incurred after August 12, 1998, the date of the informal conference. Services rendered prior to this date should be submitted to the District Director for her consideration.

I do not accept the Employer's objections as this complex case has been successfully prosecuted with a most reasonable number of hours. Moreover, the litigation expenses cited by the Employer are subject to reimbursement as a necessary and appropriate legal expense in the successful prosecution of this case.

In light of the nature and extent of the excellent legal services rendered to Claimant by his attorney, the amount of compensation obtained for Claimant and the Employer's comments on the requested fee, I find a legal fee of $11,675.61 (including expenses of $1,524.36) is reasonable and in accordance with the criteria provided in the Act and regulations, 20 C.F.R. §702.132, and is hereby approved. The expenses are approved as reasonable and necessary litigation expenses.

Section 3(e) Credit

In the case at bar, the Employer seeks a credit for the back pay amounts paid to Claimant as a result of his successful grievance proceeding wherein he was ordered to be reinstated to his job and paid appropriate back wages. On the other hand, Claimant's brief is silent on this issue.

The purpose of Section 3(e) is to prevent double recovery by the Claimant for "any amounts paid to an employee for the same injury, disability ... for which benefits are claimed." **See** 33 U.S.C. §3(e). In the pending case, Claimant has received a back pay amount6 totalling the gross amount of $31,878.00, and Claimant received the net amount of $13,585.06 after various deductions were

made.

Our research has failed to identify, and counsel have not cited, any pertinent precedent on this issue of a back pay award after a successful grievance. While it is true that Claimant did not and could not work during that closed period of time, his receipt of appropriate back pay has made him whole and, to prevent a double recovery by Claimant, the Employer is entitled to a credit for the full amount of the back pay paid Claimant.

However, with reference to Claimant's receipt of unemployment benefits, the Employer is not entitled to a credit for these benefits as these were paid by a third party but not for a disability for which he has claimed benefits. They were paid to him as he was ready, willing and able to return to work but the Employer was unable to provide suitable alternate work for him. Thus, the Employer is not entitled to a credit for the receipt of such benefits.

ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law and upon the entire record, I issue the following compensation order. The specific dollar computations of the compensation award shall be administratively performed by the District Director.

It is therefore **ORDERED** that:

1. The Employer as a self-insurer shall pay to the Claimant compensation for his temporary total disability from January 15, 1997 through May 15, 1997, based upon an average weekly wage of $778.77, such compensation to be computed in accordance with Section 8(b) of the Act.

2. The Employer as a self-insurer shall also pay compensation for his temporary total disability from May 16, 1997 through March 30, 1998, based upon his average weekly wage of $843.98, such compensation to be computed in accordance with Section 8(b) of the Act.

3. Commencing on April 1, 1998, and continuing through March 28, 1999, the Employer shall pay to the Claimant compensation benefits for his permanent total disability, plus the applicable annual adjustments provided in Section 10 of the Act, based upon an average weekly wage of $843.98, such compensation to be computed in accordance with Section 8(a) of the Act.

4. Interest shall be paid by the Employer on all accrued benefits at the T-bill rate applicable under 28 U.S.C. §1961 (1982), computed from the date each payment was originally due until paid. The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

5. The Employer shall furnish such reasonable, appropriate and necessary medical care and treatment as the Claimant's work-related injury referenced herein may require, commencing on January 13, 1997, subject to the provisions of Section 7 of the Act.

6. The Employer shall pay to Claimant's attorney, Carolyn P. Kelly, the sum of $11,675.61 (including expenses) as a reasonable fee for representing Claimant herein before the Office of Administrative Law Judges between August 13, 1998 and September 9, 1999.

7. The Employer is entitled to a credit for the payments made to Claimant herein, including the gross amount of the back pay he received after his successful grievance, pursuant to Section 3(e) of the Act.

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DAVID W. DI NARDI
Administrative Law Judge

Dated:

Boston, Massachusetts

DWD:ln